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In The

Supreme Court of the United States

October Term, 1994

JOHN C. ELLINGSWORTH, Warden, Sussex Correctional Institution, and CHARLES M. OBERLY, III, Attorney General of the State of Delaware,

Petitioners,

v.

GEORGE L. REYNOLDS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When defense counsel intentionally chose for strategic reasons not to present a constitutional claim at trial and on direct appeal, is federal habeas relief barred under the deliberate bypass doctrine of *Fay v. Noia*, 372 U.S. 391 (1963), irrespective of the adequacy of the state courts' procedural ruling?

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PETITION FOR WRIT OF CERTIORARI

John C. Ellingsworth, Warden of the Sussex Correctional Institution, and Charles M. Oberly, III, Attorney General of the State of Delaware, petitioners, request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered May 2, 1994.

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 23 F.3d 756 (3d Cir. 1994) and is reproduced in the Appendix at 1-42. The opinion of the United States District Court for the District of Delaware (App. 47-69) is not reported.

The 1988 opinion of the court of appeals, reversing the 1986 decision of the United States District Court for the District of Delaware which had denied federal habeas relief, is officially reported at 843 F.2d 712 (3d Cir. 1988). The 1986 decision of the district court is not reported and is reproduced in the Appendix at 71-78. The following opinions are also reproduced in the Appendix:

1. The 1980 opinion of the Delaware Supreme Court, affirming respondent's convictions on direct appeal, is reported at 424 A.2d 6 (1980) (App. 79-83);

2. The 1983 order of the Delaware Superior Court, denying respondent's initial motion for state post-conviction relief, is not reported (App. 84-90);

3. The 1983 order of the Delaware Supreme Court, affirming the denial of respondent's first state post-conviction application is not reported (App. 90-92); and

4. The 1986 opinion of the Delaware Superior Court, denying respondent's second motion for state post-conviction relief, is not reported (App. 93-95); respondent withdrew his appeal from that judgment (App. 96).

JURISDICTION

The judgment of the court of appeals, reversing the decision of the district court and remanding the case for further proceedings, was entered on May 2, 1994. (App. 45-46). A timely motion for rehearing was denied June 13, 1994. (App. 43-44). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A jury found George Lee Reynolds guilty of first degree murder, first degree robbery, and second degree conspiracy for the robbery and killing of Frank Snyder on November 29, 1974. Reynolds was later sentenced to life imprisonment plus 20 years.

1. The Trial

In November 1974, Frank Snyder was robbed and brutally murdered in his general store in Milton, Delaware. By 1976, the crimes remained unsolved, but in February of that year, George Reynolds, while being questioned about an unrelated robbery,[1] told the police that he knew who had killed Snyder. When police returned a few days later, he refused to give the officers any further details, saying he did not want to be a "snitcher." Trial Transcript (Tr.) 239-41 ("the February statements"). However, in late March 1976, Reynolds

[1] At this time, Reynolds was in jail awaiting trial for that unrelated crime.

again contacted the police and, after speaking with his father, he gave the authorities two separate statements. In those statements, he implicated himself and two others, John Rooks and Thomas Young, in the Snyder homicide. Tr. 128-32 ("the March 28 and 31 statements").

Reynolds was tried separately for the Snyder homicide in 1977. Assuming that the March 28 and 31 statements would be admitted, the prosecutor referred to them in his opening statement to the jury. App. 50-53.[2] Yet, when the prosecutor sought to introduce Reynolds' statements into evidence during his case-in-chief, defense counsel requested a hearing, outside the presence of the jury, to determine their admissibility. App. 53. At the end of that hearing, the prosecutor told the trial court that, during a recess, he had spoken to the attorney who had represented Reynolds on the unrelated charge during March 1976. Although that attorney could not specifically recall whether he had agreed to the late March questioning, he told the prosecutor that his normal practice was to tell his clients not to talk to authorities. Based on that representation, the prosecutor decided that he could not argue for admission of the March 28 and 31 statements. App. 53-54; Tr. 199-201, 209.[3]

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[2] Reynolds had not filed any pretrial motion seeking to suppress any of the statements. There was no suggestion that the prosecutor had acted in bad faith in referring to the statements in opening argument. App. 85 n.2. *See Lee v. United States*, 432 U.S. 23, 34 (1977); *id.* at 35 (Brennan, J., concurring).

[3] The trial judge admitted the February statements. Tr. 210. In deciding that Reynolds' representation by counsel on the unrelated robbery precluded any police questioning on the Snyder killing, the prosecutor overestimated the reach of the

To Reynolds' two experienced trial attorneys, Joseph Hurley and Karl Haller, this announcement was "a substantial victory" which made them eager "to push forward to conclude the trial because they anticipated a verdict in [the] defendant's favor." App. 87-88. As a result, the two did not want to abort this trial. Based on their experience, they also believed that the jury had probably forgotten the prosecutor's opening remarks. To avoid reminding the jury of those statements, the defense chose not to ask for a curative instruction. App. 58, 88.

Five days later, the jury found Reynolds guilty of murder, robbery, and conspiracy.[4] After the verdict,

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Sixth Amendment right to counsel. *McNeil v. Wisconsin*, 111 S.Ct. 2204, 2207-08 (1991); *Maine v. Moulton*, 474 U.S. 159, 178-80 (1985).

In the trial of a co-conspirator, the March 28 and 31 statements were later held to be involuntary for purposes of admission under Del. Code Ann. tit. 11, § 3507. *State v. Rooks*, 401 A.2d 943 (Del. 1979), *appeal after remand*, 411 A.2d 316 (Del. 1980). Reynolds' attorneys were aware of the voluntariness problem, questioning the police about the issue. Tr. 133, 151-56, 159, 165. One of Reynolds' attorneys believed that the prosecutor had decided not to introduce the statements because portions of them were inconsistent with other aspects of the prosecution's case. App. 88.

[4] Despite the observation of the court of appeals that the case against Reynolds was razor-thin, App. 3 n.2, the case had some substance. In his comments to police in February 1976, Reynolds indicated that he had substantial knowledge about the homicide, but had chosen not to immediately divulge his knowledge. Tr. 239-40. Reynolds also admitted his involvement to Miles Cuffee and Ronald Scott. He told Cuffee that he had driven the car, waiting outside the store while two other men went inside. Tr. 349. While incarcerated, Reynolds told Scott, a fellow inmate, the same account. Tr. 368-70. Reynolds had also

defense counsel moved for a judgment of acquittal. Although that motion argued that the prosecutor had made inappropriate remarks in his summation, it did not mention his reference in opening statements to the withdrawn March statements. Haller, who was to be responsible for Reynolds' appeal, then began formulating the issues to be presented. After researching the issue of the divergence between the prosecutor's opening argument and his subsequent failure to introduce the statements, he decided not to raise it on appeal to the Delaware Supreme Court. In his mind, the argument lacked merit, and if pressed, would only detract from other more meritorious arguments. App. 88.

On appeal, the Delaware Supreme Court initially remanded the case to allow defense counsel to present a motion for a new trial based on newly discovered evidence. *See* App. 55-56. After the trial judge denied that motion, the state supreme court then affirmed Reynolds' convictions. App. 79-83.

2. State Post-Conviction Proceedings

Two years later, Reynolds, now represented by different counsel, filed for state post-conviction relief. Disavowing any claim that his trial attorneys had been ineffective, Reynolds contended that the prosecutor's

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talked with another inmate about his need for a alibi, but the alibi he attempted to create collapsed. Tr. 371-72, 469. In his defense, Reynolds called four witnesses and introduced, through the testimony of a psychologist, the "favorable" results of a "truth serum" test administered to him. App. 80.

opening remarks and his subsequent withdrawal of the March statements violated the federal Due Process and Confrontation Clauses. The Superior Court conducted two days of evidentiary hearings to determine why Hurley and Haller had not raised this claim during the trial and on direct appeal. Hurley, an experienced criminal defense lawyer, testified that after the prosecutor chose not to seek to introduce the March statements, he was anxious to have the case go to the jury since the prosecutor had, in Hurley's view, severely impaired the State's case. Hurley thus did not seek a mistrial: once alerted to the error, the prosecutor might have better investigated the facts upon which he based his withdrawal of the statements, thus being in better position in any retrial. Hurley also knew that trial judges gave prosecutors some latitude in opening arguments and that it was also possible to prejudice the jury against Reynolds if he appeared to be a "slick" lawyer; Haller similarly testified. For tactical reasons, they had decided not to ask the trial judge to give a curative instruction on the subject for fear of refreshing the recollection of jurors who had forgotten the opening argument, made at the beginning of the 10-day trial. App. 87-88.

The two had not acted out of ignorance. Hurley was cognizant of the possibility of reversible error created by the prosecutor's reference in opening remarks to evidence not subsequently introduced or proffered. PTr. II-15-16.[5] In addition, the statements had not escaped

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[5] Citations to the transcript of the post-conviction hearing (PTr.) are by volume and page numbers.

their attention: Hurley specifically referred to the statements later in trial as they might be included in the testimony of a defense witness. Tr. 484-86; PTr. II-31. On direct appeal, Haller was also aware of the legal principles involved, discussing the issue after the trial with the attorney who was representing Reynolds in the post-conviction action. PTr. II-41-42. Haller, however, after researching the question, chose to forego the issue on appeal in favor of issues which he saw to be more promising. App. 88.

Based on their testimony, the Superior Court concluded that the actions of the two attorneys were not the result of either inadvertence or ignorance of the law, but reflected choices to omit the due process argument while pursuing other avenues of defense. App. 88-89.[6] Such

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[6] The disquietude experienced by the court of appeals with this finding is unwarranted. *See* App. 14-15. The only logical interpretation of the Superior Court's language is that the court decided that Hurley and Haller had acted intentionally. There are three reasons for a failure to object: awareness of the legal issue, but a strategic decision not to object; awareness of the legal issue, but a negligent decision not to object; and ignorance of the applicable law. The Superior Court rejected Reynolds' contention that either defense counsel knew the law and negligently failed to object or that the two attorneys did not know the applicable law. App. 88-89. By process of elimination, the only reason that the two did not raise the issue at trial is due to their strategic decision. *See LaVallee v. Delle Rose*, 410 U.S. 690, 692-95 (1973). Indeed, the court of appeals comes to that conclusion on its own, calling it "the most reasonable [hypothesis] given the general quality of counsel's trial performance and the fact that it would appear to have been in Reynolds' best interest not to seek a mistrial." App. 14. The state supreme court, in turn, clearly viewed the record and the lower court decision as showing that

tactical conduct precluded Reynolds from now asserting the claim in a post-conviction motion. App. 84-90. The Delaware Supreme Court again affirmed. Referring to its earlier opinion in *Conyers v. State*, 422 A.2d 345 (Del. 1980), in which it had adopted the rationale of *Wainwright v. Sykes*, 433 U.S. 72 (1977) for state post-conviction motions, the court held that state post-conviction relief remained unavailable for claims "which reasonably competent counsel intentionally chose not to press, in accordance with procedural rules, as part of a tactical strategy." App. 91. Because the record established that Reynolds' attorneys had made such a strategic choice, the Superior Court had properly denied his post-conviction motion. App. 91-92.

Undaunted, Reynolds then filed a second post-conviction motion. In it, he renewed his Due Process and Confrontation Clause arguments, adding a claim that Hurley and Haller were ineffective in not objecting to the opening statement during the trial or raising the issue on

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Reynolds' attorneys had made intentional strategic decisions not to pursue the issue at trial or on appeal. App. 91-92. The findings by that court are, just as those of the Superior Court, presumptively correct. *Sumner v. Mata*, 449 U.S. 539 (1981). If the recollection of the two attorneys was not as perfect as the court of appeals might have desired, that was a factor for the state courts to consider in reaching their respective decisions. *Sumner v. Mata*, 455 U.S. 591, 597-98 (1982). *See* Meltzer, "State Court Forfeitures of Federal Rights," 99 Harv. L. Rev. 1128, 1218-19 (1986) (noting that attorneys may be unwilling to admit to having overlooked legal issue or claim). Notwithstanding the selective reading of the state record by the panel majority, App. 4-6, the findings of the state courts are fairly supported by the evidence. *Rushen v. Spain*, 464 U.S. 114, 121 n.6 (1983).

appeal. The Superior Court dismissed the motion as repetitive, App. 93-95, and Reynolds voluntarily dismissed his appeal to the Delaware Supreme Court. App. 96.

3. Federal Habeas Corpus Proceedings – Part 1

Reynolds then sought federal habeas relief, advancing three claims relating to the prosecutor's opening remarks: 1) that the reference to the March 28 and 31 statements was improper since the statements were never admitted into evidence; 2) that the trial judge should have *sua sponte* instructed the jury to disregard the prosecutor's comments; and 3) that defense counsel were ineffective under the Sixth Amendment since they did not object at trial or raise the issue on direct appeal. After independently reviewing the state court record, the district court concluded, as had the state Superior Court, that Haller and Hurley had made strategic choices not to press the due process claims during the trial or on direct appeal. Because such deliberate conduct could not establish justifiable cause under *Wainwright v. Sykes*, 433 U.S. 72 (1977), the due process claims were procedurally barred. App. 74-76. On the merits of the Sixth Amendment claim, defense counsel's decision-making fell within the wide range of professionally competent representation. App. 76-78.

On appeal, the court of appeals overturned the procedural default analysis used by the district court. Believing that *Sykes* required it, *sua sponte*, to initially decide whether a state procedural bar is an "independent and adequate" state ground to preclude federal review, the

court surveyed Delaware's procedural rules. 843 F.2d 712, 717-19 (3d Cir. 1988). From that examination, the court concluded, contrary to the opinions of the state courts and without any reference to the findings that defense counsel had not pressed the claim as part of a tactical strategy, that the procedural rule used by the state courts and relied upon by the district court was not "adequate" to justify the application of *Sykes*. 843 F.2d at 719-22. Turning to the Sixth Amendment claim, the court decided that there was a substantial question whether it had been exhausted and, if so, whether it was procedurally barred. The court of appeals thus vacated the district court's ruling and remanded the matter for further proceedings. 843 F.2d at 723-24. State prosecutors unsuccessfully applied to this Court for a writ of certiorari. 488 U.S. 960 (1988).

4. Federal Habeas Corpus Proceedings – Part 2

On remand, Reynolds voluntarily dismissed his claims of ineffective assistance of counsel. The district court, however, held that the intentional decisions by Reynolds' attorneys precluded review of his claim. Independent of the procedural default doctrine of *Sykes*, tactical decisions, such as those made in Reynolds' case, would bar federal habeas relief under the principles set out in *Fay v. Noia*, 372 U.S. 391 (1963), and *Henry v. Mississippi*, 379 U.S. 443 (1964). App. 60-63. The district court then turned to the factual findings of the state courts that Reynolds' attorneys had intentionally acted for strategic reasons. App. 64. Independently reviewing the state court record, the court concluded that the state

post-conviction hearing "was . . . full, fair, and adequate." App. 67. Holding that the state courts' factual findings were fairly supported by the state post-conviction record (App. 68), the district court independently determined that, as a matter of law, Reynolds' attorneys had deliberately bypassed opportunities to remedy the error posed by the prosecutor's opening statement. App. 68-69. As a result, Reynolds was not entitled to relief.

On Reynolds' appeal, a divided panel of the court of appeals reversed the district court's decision. Notwithstanding the strategic decisions of Reynolds' attorneys, acknowledged to "have been in Reynolds' best interest" (App. 14), the majority held that the deliberate bypass doctrine did not bar Reynolds' claims. According to the majority, *Fay* "finds its justification in comity concerns." App. 19. Because *Fay* was "based on comity . . . it does not bar federal habeas review in the absence of a procedural default under state law." App. 23. In addition, there was no evidence that Reynolds' attorneys had withheld the objection to the prosecutor's opening statement with the intent to proceed to federal habeas if the gamble did not pay off. App. 16, 20.[7] Though acknowledging that the Court of Appeals for the Seventh Circuit, in *Brownstein v. Director, Illinois Dep't of Corrections*, 760 F.2d 836

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[7] The panel majority reached these two conclusions despite circuit precedent to the contrary. *See Beaty v. Patton*, 700 F.2d 110, 112-13 (3d Cir. 1983); *United States ex rel. Trignani v. Russell*, 405 F.2d 1119, 1122 n.7 (3d Cir. 1968); *In re Reynolds*, 397 F.2d 131, 134-35 (3d Cir. 1968), *vacated on other grounds*, 408 U.S. 934 (1972); *United States ex rel. Hill v. Pinto*, 394 F.2d 470, 473-74 (3d Cir. 1968); *United States ex rel. Gockley v. Myers*, 378 F.2d 398, 400-01 (3d Cir. 1967), *cert. denied*, 396 U.S. 847 (1969).

(7th Cir.), *cert. denied*, 474 U.S. 858 (1985), had on similar facts held the petitioner to be barred from federal habeas review under *Fay*, the majority declined to follow *Brownstein*. App. 24-27.

The dissenting judge challenged the majority's reading of *Fay*. According to her, the majority mistakenly believed *Fay* to articulate only one holding when in fact the case contained two principles: 1) independent and adequate state grounds sufficient to block direct review did not preclude federal habeas review and 2) federal courts could deny relief if the petitioner "had deliberately bypassed the orderly procedure of the state courts and, in so doing, forfeited available state court remedies." App. 30. *Sykes* had only revived the independent and adequate state ground doctrine that had been discarded by *Fay* for federal habeas, but did not undercut the deliberate bypass aspect of *Fay*. App. 30-32. Federal habeas, moreover, struck "at the very heart of federalism principles," App. 33, principles which deserved respect even in the absence of a state procedural rule, as evidenced by the abuse of the writ doctrine. Federalism, additionally, was not the sole driving force in habeas jurisprudence, a general interest in finality of criminal convictions being an important theme. App. 34.

In the dissent's view, the majority had no support for its conclusion that Reynolds' "'strategic choices' did not constitute a 'deliberate bypass' merely because Reynolds could have believed that he could bring his claim in a Rule 35 proceeding and therefore was not attempting to bypass the state courts." App. 36. Not only was there no evidentiary basis for the majority's hypothesis, App. 36

n.3, but the majority had not accounted for the unambiguous record "that appellate counsel made a deliberate decision not to raise the issue on direct appeal for tactical purposes." App. 38-39. On these facts, *Brownstein* dictated the correct route to the decision in this case, despite the majority's attempt to discount the Seventh Circuit's logic. App. 36-37. As a result, the district court's conclusion, "similar to the holding in *Brownstein*," was correct: "Reynolds took his chances and he lost. He engaged in the kind of strategic behavior that disentitles him to habeas relief." App. 41-42.

REASONS FOR GRANTING THE WRIT

Two state courts and a federal district court have found that George Reynolds' defense counsel had intentionally chosen, for strategic reasons, not to use opportunities during trial and direct appeal to challenge the prosecutor's decision not to introduce into evidence two confessions, mentioned in his opening remarks. The state courts determined that such an informed, tactical choice barred state post-conviction relief, and the district court held that, irrespective of the applicability of *Wainwright v. Sykes*, 433 U.S. 72 (1977), federal habeas relief was precluded under *Fay v. Noia*, 372 U.S. 391 (1963). Nonetheless, the court of appeals held that, regardless of the reasonableness of counsel's conduct, the State of Delaware could not, in federal court, hold Reynolds to the consequences of his lawyers' conduct. That decision, departing from a constant principle of the past 30 years of federal habeas jurisprudence, finds no support in principle, precedent, or policy.

1. The Decision of the Court of Appeals Is Inconsistent With Decisions of This Court And Other Courts of Appeals.

a. Continued Viability of *Fay v. Noia*

More than 30 years ago, in *Fay v. Noia*, 372 U.S. 391 (1963), this Court decided that federal habeas courts were not barred by the doctrine that prevents direct review of state court judgments resting on independent and adequate state procedural grounds. At the same time, the Court held that federal judges had the discretion "to deny relief to an applicant under certain circumstances." 372 U.S. at 438. That power, based on the traditional equitable doctrine of "clean hands," arose not from the independent and adequate state grounds doctrine, but from the congressional command, expressed in 28 U.S.C. § 2243, that a federal habeas court must "dispose of the [petition] as law and justice require." 372 U.S. at 438. The general equitable principles underlying habeas corpus would enable a federal court to deny relief based on the petitioner's "conduct in relation to the matter at hand. . . ." 372 U.S. at 438. As a specific example, the Court held that if a habeas petitioner "forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can be fairly described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his claims on the merits." 372 U.S. at 439.

Less than two years later, the Court in *Henry v. Mississippi*, 379 U.S. 443 (1964), reaffirmed the principle that, regardless of the validity of a state forfeiture, the federal

courts have an independent power to deny relief to a defendant because of his strategic decisions in the state courts. In *Henry,* defense counsel had not made a timely objection to evidence derived from an illegal search. Although the Court strongly intimated that the state contemporaneous objection rule invoked by the Mississippi courts was not an "independent and adequate" state procedural ground to bar direct federal review, 379 U.S. at 448, the Court did not simply proceed to consider the merits of the federal claim. Instead, it remanded the case to the state courts to explore the possibility that defense counsel had "deliberately bypassed the opportunity to make a timely objection in the state court." 379 U.S. at 450. Suggesting that defense counsel might have delayed their objection in order to use the evidence, thus enhancing the chance of acquittal, or to invite error, laying a foundation for reversal, the Court reiterated that "[i]f either reason motivated the action of petitioner's counsel and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on the petitioner and would preclude him from a decision on the merits of his federal claim whether in the state courts or here." 379 U.S. at 451.

Clearly, *Fay* and *Henry* teach that, even if a state procedural bar is not an adequate basis to preclude federal review, a defendant's conduct in delaying or withholding a claim for tactical advantage is in itself sufficient to deny relief. The Court in *Wainwright v. Sykes,* 433 U.S. 72 (1977) indeed suggested that the remand in *Henry* was to "determine whether a *separate* adequate state ground might exist – that is, whether petitioner had knowingly and deliberately waived his right to object at trial for

tactical or other reasons." 433 U.S. at 83 n.8 (emphasis added). Deliberate bypass is not tied to the existence of a state procedural rule or express forfeiture sanction, as evidenced by the application of *Fay* to federal prisoners, *Kaufman v. United States*, 394 U.S. 217 (1969), and the Court in *Fay* discounting the significance of state procedure. 372 U.S. at 431-33.[8] Instead, the deliberate bypass concept stems from the general equitable principles underlying federal habeas corpus, and the Court's subsequent willingness to defer more to state procedural defaults does not undercut the equitable principles the Court found to be important more than 30 years ago and continues to find important.[9]

Though *Fay* has been overruled by the procedural default rule of *Sykes*, *Coleman v. Thompson*, 111 S.Ct. 2546, 2565 (1991), the rule set out in *Sykes* assumes the existence of a state procedural rule,[10] and in the absence of

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[8] The existence of such a rule might make the analysis easier, *cf. Coleman v. Thompson*, 111 S. Ct. 2546, 2559 (1991) (value of state judges providing clear and express statement of procedural default), but *Fay* only requires a procedural opportunity. Footnote 8 in *Kaufman*, referring to the availability of direct appeal to a federal court of appeals, indicates as much. 394 U.S. at 227 n.8.

[9] *See, e.g., Withrow v. Williams*, 113 S. Ct. 1745, 1757 (O'Connor, J., concurring in part and dissenting in part), 1766-67 (Scalia, J., concurring in part and dissenting in part) (1993); *Gomez v. United States District Court*, 112 S. Ct. 1652, 1653 (1992); *McCleskey v. Zant*, 499 U.S. 467, 490 (1991); *Duckworth v. Eagan*, 492 U.S. 195, 211 (1989) (O'Connor. J., concurring); *Sanders v. United States*, 373 U.S. 1, 17-18 (1963).

[10] 433 U.S. at 87 (referring to Florida procedural requirement as "an independent and adequate state procedural

such a rule (or if the rule, as here, was held to be inadequate), the procedural default principle is not applicable. *Coleman*, 111 S.Ct. at 2560-61, 2565; *id.* at 2569 (White, J., concurring and concurring in judgment). *See Dugger v. Adams*, 489 U.S. 401, 410 n.6. (1989). The courts of appeals have considered the application of *Fay* where *Sykes* does not reach, a problem best exemplified by the decision in *Brownstein v. Director, Illinois Dep't of Corrections*, 760 F.2d 836 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985). The defendant had not objected when he was tried without a jury, but Illinois had no procedural rule requiring an objection, and a defective waiver of a jury trial was an error that could be asserted at any time. The court of appeals nonetheless affirmed the denial of habeas relief. The absence of any state procedural rule rendered a procedural default analysis under *Sykes* irrelevant, and the court of appeals looked to *Fay* for guidance. According to the court, *Fay* rested on the "equitable considerations underlying" habeas corpus, and the deliberate bypass of a state procedural requirement was only an example of the type of conduct that could warrant denial of relief. Instead, a deliberate choice not to take advantage of an opportunity to present the claim was sufficient under *Fay* to bar relief. 760 F.2d at 842. Because the defendant was aware of his right to a jury trial and, despite the opportunity, did not object to his bench trial, solely to obtain a strategic advantage, the court of appeals held that under *Fay*, he was barred from federal habeas. The Court of Appeals for the Second Circuit – before and after *Sykes* – has also held

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ground"); *id.* at 93 (Burger, C.J., concurring) ("preservation of this type of claim under state procedural rules").

that *Fay* precludes federal habeas relief when the defendant, for strategic reasons, elects to bypass opportunities to present his federal claim, even though there was no procedural rule. *Hawkins v. LeFevre*, 758 F.2d 866, 873 (2d Cir. 1985) (noting principle, but holding it inapplicable on facts); *United States ex rel. Terry v. Henderson*, 462 F.2d 1125, 1128-30 (2d Cir. 1972); *United States ex rel. Cruz v. LaVallee*, 448 F.2d 671, 674-79 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297, 1298-1301 (2d Cir. 1971).

The continued viability of *Fay* after *Sykes* and *Coleman* is consistent with basic principles of courtroom procedure. Under the adversary system, once a defendant has the assistance of counsel, the vast majority of strategic and tactical decisions during the trial and appeal rests with the attorney. *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983); *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring); *Estelle v. Williams*, 425 U.S. 501, 508 n.3, 512 (1976). Unless a particular decision by counsel constitutes ineffective assistance, the defendant is bound by those decisions. *Taylor v. Illinois*, 484 U.S. 400, 418 (1988); *id.* at 434 (Brennan, J., dissenting); *Smith v. Murray*, 477 U.S. 527, 535-36 (1986); *Reed v. Ross*, 468 U.S. 1, 13-14 (1984). At the same time, "the adversary system could not function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments. . . ." *Taylor*, 484 U.S. at 410-11. As a result, there are fee principles more familiar than the requirement that one object to the introduction of evidence or to proceedings during the trial or risk foregoing future challenges. *Freytag v. C.I.R.*, 111 S.Ct. 2631, 2647 (1991) (Scalia, J., concurring in part and concurring in judgment); *Nelson v. People of State of*

California, 346 F.2d 73, 80 n.4 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965); Meltzer, "State Court Forfeitures of Federal Rights," 99 Harv. L. Rev. 1128, 1134-35 (1986). The significance of this "background norm of procedural regularity"[11] has varied over time, but the Court has not suggested that a claim intentionally withheld for strategic reasons can be raised in federal habeas corpus. *Smith*, 477 U.S. at 534-36; *Reed*, 468 U.S. at 13-14; *Sykes*, 433 U.S. at 96 (Stevens, J., concurring); *id.* at 98-99 (White, J., concurring in judgment); *id.* at 101-02 & n.4 (Brennan, J., dissenting). *See McCleskey*, 499 U.S. at 489 (claim intentionally withheld form previous habeas petition); *Rose v. Lundy*, 455 U.S. 509, 520-21 (1982) (plurality); *Sanders v. United States*, 373 U.S. 1, 18 (1963). *Cf. Johnson v. United States*, 318 U.S. 189, 200-01 (1943) (direct appeal; no plain error). The deliberate bypass doctrine announced in *Fay* ensures that even if there is no state procedural rule adequate to bar federal habeas review under *Sykes* and *Coleman*, a defendant will not be able to take advantage of an error that, for strategic reasons, he either suggested or permitted.

b. Application of *Fay*

The rejection by the court of appeals in this case of the deliberate bypass principle of *Fay* rests on two points, both of which are flawed. *First*, the court assumed that to trigger the deliberate bypass rule, the defendant had to have violated a state procedural rule. App. 23. Because the court had previously decided that there was no such rule, it concluded that Reynolds had not deliberately

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[11] *McCleskey*, 499 U.S. at 490.

bypassed state remedies. App. 27. That view of *Fay* is at odds with the Court's decision: the Court talks only of bypassing state procedures,[12] and though the courts of appeals in applying *Fay* often refer to a state procedural rule, the lower courts have invoked *Fay* without reliance on or reference to a state rule.[13] *Second*, the court assumed that a deliberate bypass could be found only if the motivation for the tactical decision was to present the claim in federal habeas corpus. App. 16, 20. That premise is also inconsistent with *Fay*: the motivation for bypassing state remedies can be for any reason, not simply to present the claim in the first instance to the federal courts,[14] and any doubt was removed by the Court in *Henry*.[15] Defense counsel are also more likely to withhold a claim for tactical purposes without regard to the availability of

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[12] 372 U.S. at 438 ("deliberately bypassed the orderly procedure of the state courts"), 439 ("deliberate by-passing of state procedures"). *Accord Kaufman*, 394 U.S. at 227 n.8.

[13] *E.g., Grieco v. Meachum*, 533 F.2d 713, 719 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976); *Beaty v. Patton*, 700 F.2d 110, 112-13 (3d Cir. 1983); *In re Reynolds*, 397 F.2d 131, 134-35 (3d Cir. 1968), *vacated on other grounds*, 408 U.S. 934 (1972); *Hansen v. Burke*, 437 F.2d 829, 831 (7th Cir. 1971). If Reynolds was a federal prisoner, there is little doubt that on the record before the district court, his claim would be barred by *Kaufman*. *United States v. McCord*, 509 F.2d 334, 345-46 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975); *Williams v. United States*, 463 F.2d 1183, 1184-85 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972); *Battaglia v. United States*, 428 F.2d 957, 959-60 (9th Cir.), *cert. denied*, 400 U.S. 919 (1970).

[14] 372 U.S. at 439.

[15] 379 U.S. at 451. *See Terry v. Peyton*, 433 F.2d 1016, 1020 (4th Cir. 1970); *In re Reynolds*, 397 F.2d at 134; *United States ex rel. Gockley v. Myers*, 378 F.2d 398, 400-01 (3d Cir. 1967), *cert. denied*, 396 U.S. 847 (1969).

state or federal collateral review, focusing instead on the effect upon the trial or any retrial. *See* Meltzer, 99 Harv. L. Rev. at 1196-97 nn.340-41.[16] In its zeal to declare the intentional decisions of Reynolds' attorneys irrelevant, the court of appeals disregarded these principles.

2. The Rule Articulated by the Court of Appeals Disrupts the Orderly Administration of Justice.

Between a finding that a state procedural bar is inadequate under *Sykes* and an intentional decision not to raise an issue at trial (or on appeal) for strategic reasons lies a gap in federal habeas jurisprudence. Though this Court has put to rest the deliberate bypass doctrine,[17] that doctrine nonetheless fills this gap. The Court in *Sykes* and subsequent decisions has deferred to state determinations of procedural default, but the Court has not erased the principle that independent of any state-

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[16] The insistence of the court of appeals that the claim be withheld with a view towards going to federal court (App. 16, 20) is also illogical; no one can be expected to later testify that he did not raise the claim in the state courts, instead relying on the opportunity to pursue federal habeas relief. *See Wedra v. LeFevre*, 988 F.2d 334, 342 (2d Cir. 1993). The strategy envisioned by the court of appeals is also next to impossible to execute because it assumes that the defendant will exhaust state remedies without "obtaining a binding factual determination in the state courts or forfeiting his right to habeas review." Meltzer, 99 Harv. L. Rev. at 1197 n.342. It is also unlikely that in the middle of trial, defense counsel's thoughts extend as far ahead in the future as federal habeas corpus. *See* Meltzer, 99 Harv. L. Rev. at 1190-91 & nn. 316-24, 1197-98.

[17] *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715, 1719-21 (1992); *Coleman*, 111 S.Ct. at 2565.

declared default, federal courts can decide that a claim is barred because of the petitioner's conduct in the state courts. *See Sykes*, 433 U.S. at 83 n.8. Any other reading of *Sykes* departs from the clear trends of federal habeas jurisprudence for the last 15 years – a less intrusive federal role in the review of state criminal proceedings, a greater expectation of procedural regularity, and a greater preference for state courts to first hear challenges to a conviction. The fact that the State does not have a procedural requirement that is adequate under *Sykes* is not a license to totally disregard a petitioner's strategic behavior in the state courts.

The relative silence of the lower courts on the issue is easily explained: the need has diminished for the federal courts to determine the reason for an attorney's decision not to raise an issue at trial or on appeal. For a claim to be procedurally barred under *Sykes* and *Coleman*, an inadvertent default by defense counsel is as preclusive as an intentional default. *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986); *Engle v. Isaac*, 456 U.S. 107, 133-34 (1982). It is also easier for a federal court to assume that counsel's failure was inadvertent. *Carrier*, 477 U.S. at 487-88. *See Strickland v. Washington*, 466 U.S. 668, 697 (1984). Yet, scenarios involving intentional tactical decisions are not rare: just last Term, the Court considered the preclusive effect of a decision not to move for dismissal of an indictment under the Interstate Agreement on Detainers. *Reed v. Farley*, 114 S.Ct. 2291, 2298-2300 (1994).[18] State courts are also more

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[18] See also *Smith v. Murray*, 477 U.S. 527, 534, 536 (1986); *Estelle v. Williams*, 425 U.S. 501, 508-10 (1976); *Hunter v. Clark*, 906 F.2d 302, 305, 307 (7th Cir. 1990), *vacated on other grounds*, 934

likely now to strictly enforce state procedural requirements, thus reducing the likelihood that a state rule will not be found "adequate" to bar federal habeas review. Meltzer, 99 Harv. L. Rev. at 1156. *See Meadows v. Holland*, 831 F.2d 493, 496-98 (4th Cir. 1987) (*en banc*), *vacated on other grounds*, 489 U.S. 1049 (1989); *McBee v. Grant*, 763 F.2d 811, 814-16 (6th Cir. 1985).

Federal courts nonetheless find that a state procedural rule is not adequate to preclude review in habeas corpus of the supposedly defaulted claim.[19] Regardless of the particular reason for disregarding the state procedural bar, the effect of these declarations is to frustrate a State's legitimate attempt to give more finality to its criminal convictions. If the adequacy of a state procedural rule reflects the balance between finality and the federal interest in affording collateral review, the balance is surely different when the defendant intentionally bypasses his chance to raise the issue at trial and on direct appeal. A state forfeiture rule, in a given case, may well not bar federal habeas review, but the existence of the rule is surely a sign that the State regards finality as

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F.2d 856 (7th Cir.) (*en banc*), *cert. denied*, 112 S.Ct. 388 (1991); *Coleman v. O'Leary*, 845 F.2d 696, 697-98 (7th Cir.), *cert. denied*, 488 U.S. 972 (1988); *United States ex rel. Abdus-Sabur v. Cuyler*, 653 F.2d 828, 833 (3d Cir.), *cert. denied*, 454 U.S. 1088 (1981).

[19] *E.g.*, *Smith v. Dixon*, 996 F.2d 667, 671-75 (4th Cir. 1993), *vacated*, 14 F.3d 956 (4th Cir. 1994) (*en banc*); *Gutierrez v. Moriarty*, 922 F.2d 1464, 1469-71 (10th Cir.), *cert. denied*, 112 S.Ct. 140 (1991); *Johnson v. Muncy*, 830 F.2d 508, 510-14 (4th Cir. 1987); *Adams v. Dugger*, 816 F.2d 1493, 1497 (11th Cir. 1987), *rev'd*, 489 U.S. 401 (1989); *Wheat v. Thigpen*, 793 F.2d 621, 624-29 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987).

an important consideration in its criminal law.[20] The deliberate bypass doctrine of *Fay*, in this situation, furthers this interest in finality, according some deference to the State's expectation that it will not be called upon to answer a constitutional challenge that had been intentionally abandoned by defense counsel years earlier.

Because the States have primary responsibility for the enforcement of the criminal law, *e.g.*, *Brecht v. Abrahamson*, 113 S.Ct. 1710, 1729 (1993) (citing cases), the States bear the cost of federal habeas litigation, not only in the allocation of resources to respond to habeas petitions, but in the cost of uncertainty and delay in the enforcement and execution of criminal judgments. *Coleman*, 111 S.Ct. at 2559; *Teague v. Lane*, 489 U.S. 288, 310 (1989); *Reed*, 468 U.S. at 26 n.3 (Rehnquist, J., dissenting). It is also the State that must retry the petitioner, even if, as in this case involving a murder committed 20 years ago, the result of any retrial will not necessarily be more reliable or accurate. *Brecht*, 113 S.Ct. at 1721; *McCleskey*, 499 U.S. at 491; *Spaulding v. Aiken*, 460 U.S. 1093, 1096-98 (1983) (opinion of Burger, C.J., regarding denial of certiorari); *Fay*, 372 U.S. at 445 (Clark, J., dissenting). Conversely, prisoners have every incentive to delay

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[20] "Now it may well be a fair inference to draw from *Wainwright* and *Frady* that a procedural default will bar subsequent review in a section 2255 proceeding unless good cause for and prejudice from the default are shown, even if the applicable statute or rule of procedure does not provide, as it did provide in both of those cases, that the failure to raise an issue in the fashion prescribed bars the criminal defendant from raising it later." *Norris v. United States*, 687 F.2d 899, 901 (7th Cir. 1982).

presentation of their claims in the hope that reprosecution will become impossible. *McCleskey*, 499 U.S. at 491-92; *Spaulding*, 460 U.S. at 1097 (opinion of Burger, C.J., regarding denial of certiorari). Even if the State can not prevent a ruling that a state procedural rule is inadequate, thus enabling a prisoner to litigate the merits of an inadvertently defaulted claim, litigation of a claim previously withheld for strategic reasons exposes the State to manipulation by lawyers and prisoners alike. A willingness to excuse defaults in the face of direct evidence that counsel intentionally withheld the claim for strategic reasons increases the same incentives for attorneys to engage in "sandbagging" the Court saw more than 15 years ago. The focus of the parties assembled for a criminal trial should be on the trial and the direct appeal in state court, not on the possibility of claiming, several years later, in federal court that constitutional error infected the trial. *Brecht*, 113 S.Ct. at 1719; *Engle*, 456 U.S. at 127; *Sykes*, 433 U.S. at 90.

While the deliberate bypass doctrine of *Fay* provides distinct benefits to habeas litigation, the rule articulated by the court of appeals offers no discernible benefits. *See Brecht*, 113 S.Ct. at 1719. There is something distinctly askew with a process that allows a defendant and his attorneys to take one course of action in the state courts, but refuses to hold him to those decisions when he appears at the federal courthouse. There is no reason for the federal courts to be receptive to a habeas petitioner such as Reynolds: unless counsel's tactics and strategy are so deficient as to constitute ineffective assistance, the defendant must abide by those decisions. The State may

well bear the costs of a constitutionally ineffective decision, but a different allocation of the burden is dictated when counsel acts reasonably, but does not obtain the hoped-for result. *See Coleman*, 111 S.Ct. at 2567 ("In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation. . . . "); *Reed*, 468 U.S. at 14. Any price incurred then is not the result of the State's failure to honor the defendant's constitutional rights, but the consequence of counsel's reasonable strategic decisions. *Willis v. Kemp*, 838 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 489 U.S. 1059 (1989). *Cf. Coleman*, 111 S.Ct. at 2574 (Blackmun, J., dissenting). None of the principles underlying federal habeas corpus supports a theory that shifts the costs of counsel's unchallenged tactical decisions onto the State.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted,

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September 9, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7106

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, Warden;
CHARLES M. OBERLY, III

On Appeal From the United States District Court
For the District of Delaware

(D.C. Civil Action No. 86-00142)

Argued: November 3, 1993

Before: SLOVITER, *Chief Judge*, and STAPLETON, *Circuit Judge*, and RESTANI,* *Judge, United States Court of International Trade*

(Opinion Filed May 2, 1994)

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*Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

This appeal requires us to consider the situation of a criminal defendant whose lawyers make a tactical decision not to raise federal due process objections in the defendant's state trial or on state direct appeal, and do so under circumstances in which they could have a good faith expectation that the defendant would be able to raise these federal objections in state collateral review proceedings. The issue we address is whether the rule of *Fay v. Noia*, 372 U.S. 391 (1963), bars such a defendant from later raising his federal objections in federal court through a petition for writ of habeas corpus. We hold that it does not.

I.

In 1976, George Lee Reynolds was tried for felony murder, conspiracy, and robbery in the Superior Court of The State of Delaware. His alleged role in the crimes was to drive his two codefendants to and from the scene of the murder and robbery. The prosecuting Deputy Attorney General, in his opening statement to the jury, referred extensively to two purported confessions Reynolds had made to the police. Later in the trial, when the prosecution sought to introduce Reynolds' confessions into evidence, a hearing was held to determine their admissibility. At the hearing, the prosecution withdrew its proffer of the confessions. The prosecution never renewed its proffer,[1] and the evidence it did present turned out to be weak.[2] After the prosecution withdrew its proffer of Reynolds' confessions, Reynolds' counsel did not request a curative jury instruction regarding the Deputy Attorney General's opening statement, nor did Reynolds' counsel ask that a mistrial be declared. Reynolds was convicted and sentenced to life in prison.

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[1] In the separate trial of one of Reynolds' codefendants, the Delaware judge excluded Reynolds' confessions as unreliable because the police had induced them by making promises of freedom and a monetary reward to Reynolds that were "extravagant in the extreme." *State of Delaware v. Rooks*, 411 A.2d 316, 316 (Del. 1980); *see also, State v. Rooks*, 401 A.2d 943 (Del. 1979). After excluding Reynolds' confessions, the judge directed a verdict of acquittal for Reynolds' codefendant.

[2] *See, e.g., Reynolds v. Ellingsworth*, 843 F.2d 712, 716 n. 10 (3d Cir. 1988), *cert. denied*, 488 U.S. 960 (1988) ("*Reynolds I*") (state's case was "weak").

Following a direct appeal to the Delaware Supreme Court, a remand by the supreme court to the trial court for further hearings in light of newly discovered evidence (at which hearings the chief investigating police officer appeared as a defense witness), and a second direct appeal to the supreme court, the supreme court affirmed Reynolds' conviction. *Reynolds v. State,* 424 A.2d 6 (Del. 1980). In none of these proceedings did Reynolds' counsel complain that Reynolds' federal rights had been violated at trial.

Reynolds then sought state collateral review of his conviction pursuant to Delaware Superior Court Criminal Rule 35.[3] In that proceeding, he complained for the first time that the prosecutor's references to the confessions during his opening statement, coupled with the trial judge's failure to give a limiting jury instruction or to declare a mistrial *sua sponte,* denied Reynolds the due process required by the federal Constitution.

In the Rule 35 proceedings, the Delaware Superior Court held hearings to determine why Reynolds' lawyers had not raised his federal claims either at trial or on direct appeal. Reynolds' two trial lawyers, one of whom also represented Reynolds on direct appeal, testified at the hearings. Both said they had no recollection, independent of the transcript they were supplied, that the Deputy Attorney General had mentioned Reynolds' confessions

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[3] Delaware Superior Court Criminal Rule 35(a) provides:

> (a) Correction of Sentence. The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence.

to the jury. Moreover, both testified that they did not remember why they had not requested a limiting instruction, moved for a mistrial, or complained on direct appeal about the prosecutor's statements. Each counsel did offer hypothetical explanations, based largely upon his usual practices and his review of the record, as to why, for tactical reasons, he might have conducted Reynolds' trial and/or direct appeal as he did.

Reynolds' lead trial lawyer, an experienced criminal defense attorney who made most of the tactical trial decisions, offered three reconstructive hypotheses as to why he might not have moved for a mistrial. The first hypothesis was that he did not want a mistrial because it would give the prosecution a second opportunity to proffer the confessions after having marshalled stronger evidence to support their admissibility. The second was that a motion for a mistrial might have prompted the prosecutor to ask for a recess and rethink his decision to withdraw the confessions. The third hypothesis was that defense counsel simply overlooked the issue – in his words, "I didn't catch it," or "I blew it." Appendix at 368 and 364. When asked which hypothesis he "placed the most reliance on," Reynolds' lead trial counsel answered, "Intellectually, the first. Emotionally, the third." Appendix at 368. While denying any recollection on the subject, lead counsel also hypothesized that he did not ask for any cautionary instruction because it would serve primarily to refocus the jury's attention on the confessions.

The defense counsel who handled the direct appeal gave the following testimony as to why the matter of the confessions had not been raised on appeal:

> The reason it was not raised on appeal was because, as far as I am concerned, the better grounds for appeal were the interpretation of the stipulation regarding the truth serum and also the very good ground of the newly-discovered evidence when we had the investigating officer saying he believed the wrong man had been convicted.

Appendix at 382.

The superior court analyzed the testimony of Reynolds' counsel to ascertain whether Reynolds had shown "cause" for his failure to raise his due process claims at trial or on direct appeal. The superior court performed this analysis because it interpreted the Delaware Supreme Court's opinion in *Conyers v. State*, 422 A.2d 345 (Del. 1980), to impose a contemporaneous-objection requirement for preserving Rule 35 review, and to adopt the United States Supreme Court's *Wainwright v. Sykes* "cause and prejudice" test as the Delaware standard for deciding whether to impose a procedural bar for failure to comply with the contemporaneous-objection requirement. *State v. Reynolds*, Nos. 76-04-0026; 0027; 0027A, letter op. at 2-3 (Del. Super. Ct. Dec. 9, 1983). In *Sykes*, 433 U.S. 72 (1977), the United States Supreme Court held that a state criminal defendant forfeits the availability of federal habeas review if his lawyer fails to raise his federal claim at the time or in the manner specified by "independent and adequate" state procedural requirements unless the defendant can show "cause" for his counsel's state default and "prejudice" resulting from it.

The superior court held that Reynolds had failed to show "cause" for his trial and appellate lawyers' silence

regarding his federal due process claims, and therefore ruled that *Conyers* barred Reynolds from raising the claims in state collateral review proceedings. *State v. Reynolds*, Nos. 76-04-0026; 0027; 0027A, letter op. at 7 (Del. Super. Ct. Dec. 9, 1983). The Delaware Supreme Court upheld the superior court's decision. *Reynolds v. State*, No. 370 1983, letter op. (Del. Jan. 16, 1985).

Reynolds filed *pro se* a second Rule 35 motion raising federal constitutional claims of ineffective assistance of counsel. The superior court denied Reynolds' second Rule 35 motion as repetitive. *State v. Reynolds*, No. IS76-04-0026, 0027, letter op. at 2 (Del. Super. Ct. Mar. 12, 1986). Reynolds did not appeal. *Reynolds I*, 843 F.2d at 723.

Reynolds later filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of Delaware pursuant to 28 U.S.C. §2254. His petition raised both unfair trial and ineffective assistance of counsel claims. The unfair trial claims were based on the prosecutor's reference to Reynolds' confessions and the failure of the trial judge *sua sponte* to instruct the jury to disregard that reference. The district court referred the case to a magistrate judge who recommended that Reynolds' unfair trial claims be barred from habeas review under the "cause and prejudice" or "independent and adequate state ground" test of *Wainwright v. Sykes*, *supra*. The magistrate judge recommended that Reynolds' ineffective assistance claims be rejected on their merits. The district court adopted the magistrate's recommendations, and denied Reynolds' habeas petition. *Reynolds I*, 843 F.2d at 716.

Reynolds appealed the district court's dismissal of his habeas petition. We reverse the district court's ruling that Reynolds' unfair trial claims were procedurally barred. The Delaware courts' determination that Reynolds had forfeited his opportunity for Rule 35 review, we concluded, was not based on an independent and adequate state procedural ground of default as required by *Sykes*. *Reynolds I*, 843 F.2d at 719. Essentially, we found that the Delaware courts had subjected Reynolds to a new contemporaneous-objection requirement when they reviewed his Rule 35 motion, a requirement which had not existed at the time Reynolds could have contemporaneously objected.[4] While the Delaware

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[4] *See Reynolds I*, 843 F.2d at 719:

To decide whether *Conyers* provides an "independent and adequate" basis for precluding federal habeas review of Reynolds's claims, we turn to the three factors upon which the Supreme Court relied to so decide in *Sykes*, to wit: whether the state procedural requirement is stated in "unmistakable terms," whether the state courts have refused to review the claims on the merits, and whether the state courts' refusal is this instance is "consistent" with other state decisions. *Id.* at 85-86, 97 S. Ct. at 2505-06.

Notwithstanding the Delaware courts' refusal to consider the merits of Reynolds's claims, we find that the *Conyers* decision does not constitute an "independent and adequate state procedural ground" barring federal courts from habeas review of the due process claim raised here. No specific Delaware procedural rule governs, in "unmistakable terms," *Sykes*, 433 U.S. at 85, 97 S. Ct. at 2505, the precise claim raised in Reynolds's Rule 35 motion, namely, that due process was denied by the prosecutor's overreaching coupled with the absence of the judge's *sua sponte* limiting

courts might be free to impose a surprise forfeiture rule to preclude state collateral review of a state trial's compliance with federal law, we held that state forfeiture-by-surprise was an inadequate ground for precluding federal collateral review. We also found that Reynolds had not exhausted his available state remedies regarding his ineffective assistance claims. Accordingly, we reversed the district court's disposition of both Reynolds' unfair trial claims and his ineffective assistance claims. We remanded for further proceedings consistent with our opinion. In our opinion, we noted that, if Reynolds chose to amend his petition to drop his unexhausted ineffective assistance claims, the district court "could then proceed to the merits" of Reynolds' unfair trial claims. *Reynolds I*, 843 F.2d at 724 n.22.

On remand, Reynolds dropped his ineffective assistance claims, and the district court once again referred his unfair trial claims to a magistrate judge. This time the magistrate judge considered the merits of Reynolds' unfair trial claims, and recommended that the claims be

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instruction or declaration of mistrial. In addition, the Delaware courts' invocation of *Conyers* is not consistent with other state authority. Thus, of the three elements that could support a conclusion that this state procedural requirement is "adequate" to preclude federal review, two are blatantly missing here.

See also id. at 720 ("Whether enunciated by court rule or case law, there is no Delaware procedural rule on point, and therefore Reynolds violated none."); *id.* at 722 ("Even if we were to conclude that a new Delaware procedural rule was created by *Conyers*, we could not also conclude that the rule barred collateral federal review, where it was applied to claims [like Reynolds' claims] for the first time in the instant case.").

dismissed. *Reynolds v. Ellingsworth*, No. 86-142-JRR, 1992 WL 404453, at *6 (D. Del. Dec. 31, 1992). The district court, however, decided once again that it was barred from considering the merits of Reynolds' unfair trial claims. This time the district court ruled that Reynolds' habeas petition was barred under the "deliberate bypass" rule of *Fay v. Noia*, 372 U.S. 391 (1962), a rule we had no occasion to address directly in *Reynolds I*.

The district court interpreted *Fay* to require that Reynolds' federal due process claims be barred from federal habeas review if, for strategic reasons, Reynolds' counsel deliberately bypassed the opportunity to object at trial and on appeal to the Deputy Attorney General's opening statements and the trial court's failure to give a curative instruction. Applying 28 U.S.C. §2254(d), the district court ruled that it was bound by what it characterized as the Delaware Superior Court's "factual determination that Reynolds' counsel intentionally decided not to object or move for a mistrial." *Reynolds v. Ellingsworth*, No. 86-142-JRR, 1992 WL 404453, at *8 (D. Del. Dec. 31, 1992). Therefore, the district curt held, "because of his counsel's intentional decision to forgo objection to the prosecution's opening statement, Reynolds is precluded from mounting a due process challenge to the effect of the statement upon the fairness of his trial." *Id.* at *9.

Reynolds now appeals the district court's second refusal to consider the merits of his due process claims.

II.

Our legal analysis is premised on two threshold assumptions, one legal and the other factual. First, we assume that *Fay v. Noia* has survived *Sykes, supra,* and *Coleman v. Thompson,* 111 S. Ct. 2546 (1991). Second, we assume that Reynolds' counsel made strategic decisions not to move for a mistrial or ask for a curative instruction.

There is substantial support for the view that the "independent and adequate state law ground" rule, as applied in cases like *Sykes, Murray v. Carrier,* 477 U.S. 478 (1986), and *Coleman v. Thompson,* 111 S. Ct. 2546 (1991), has subsumed the "deliberate bypass" rule of *Fay.*[5] If *Fay*

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[5] In creating and applying the "cause and prejudice" standard in *Sykes* and *Carrier,* the Supreme Court "limited *Fay* to its facts." *Coleman,* 111 S. Ct. at 2563, 2564. In *Coleman,* the Supreme Court went further, stating:

> In *Harris* [*v. Reed,* 489 U.S. 255 (1989)], we described in broad terms the application of the cause and prejudice standard, hinting strongly that *Fay* had been superseded. . . .
>
> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules.
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> . . . By applying the cause and prejudice standard uniformly to all independent and adequate state procedural defaults, we eliminate the irrational

is currently without independent significance, of course, the judgment of the district court cannot be upheld in light of our holding in *Reynolds I*. Since we conclude that Reynolds' petition would merit review under *Fay* as well as *Sykes*, and that a reversal is required even if *Fay* retains independent vitality, we will assume *arguendo* that the district court properly looked to *Fay* as a relevant precedent.

With respect to the factual predicate for our decision, we note, again, that the purpose of the evidentiary hearing in the superior court in the first Rule 35 proceeding was to determine whether Reynolds could show "cause" and "prejudice" under *Conyers* and *Sykes*. Reynolds maintained in that proceeding that the ineffective assistance of his counsel with respect to the confession references provided "cause" under *Conyers* and *Sykes* to excuse his failure to make a contemporaneous objection. The superior court held that Reynolds had not satisfied his burden of proof on the cause issue and characterized the record as reflecting a situation like that involved in *Engle v. Isaac*, 456 U.S. 107 (1982), a case in which the Supreme Court held that neither a deliberate strategic decision nor an inadvertent failure of counsel to raise an issue constitute "cause" unless counsel's performance has failed to meet the Sixth Amendment standard for competent assistance, 456 U.S. at 133-34; *see also Murray v. Carrier*, 477 U.S. at 485-87. The superior court cast its holding as follows:

> distinction between *Fay* and the rule of cases like *Francis* [*v. Henderson*, 425 U.S. 536 (1976)], *Sykes*, *Engle* [*v. Isaac*, 456 U.S. 107 (1982)], and *Carrier*.

111 S. Ct. at 2564-65.

> Defendant contends that the reason for the failure of his attorneys to raise the issue at trial or at the appeal stage was either inadvertence or lack of knowledge of the applicable law. I do not find that those contentions have been proved by this record.
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> 4. Considering the experience and competence of defendant's attorneys and the quality of the defense made in this case, I find that the situation here falls squarely within the language of *Engle* that "[c]ounsel might have overlooked or chosen to admit [omit] respondents' due process argument while pursuing other avenues of defense". Under the reasoning of *Engle* the situation existing here does not constitute cause justifying relief from the failure to make timely objection.

State v. Reynolds, Nos. 76-04-0026; 0027; 0027A, letter op. at 6-7 (Del. Super. Ct. Dec. 9, 1983).

In the course of his opinion, the superior court judge also described the testimony of defense counsel that we have summarized above. That description included the following observations:

> It is clear from the testimony of the defendant's attorneys that they viewed the announcement of the Deputy Attorney General that he would not seek to introduce the confession in evidence as a substantial victory and that they desired to push forward to conclude the trial because they then anticipated a verdict in defendant's favor. Defendant's lead trial counsel testified that he did not seek an admonition from the Court for the jury to disregard the Deputy Attorney General's prior reference to the confession because it

> would only focus attention on the prior references. With reference to his not seeking a mistrial, he testified that he had had no recollection of his mental processes. However, he testified, based upon his experience, that after two or three days of trial a jury forgets what was said in an opening statement. . . . Defendant's other attorney . . . testified that . . . he felt that raising [the prosecutor's reference to the confessions] would detract from the more meritorious arguments which were the thrust of the appeal.

State v. Reynolds, Nos. 76-04-0026; 0027; 0027A, letter op. at 5-6 (Del. Super. Ct. Dec. 9, 1983).

Both the Supreme Court of Delaware and the district court read the superior court's opinion as finding that Reynolds' counsel made deliberate strategic decisions not to ask for a jury instruction or a mistrial. The district court regarded this factual finding as supported by the evidence and therefore binding upon it under 28 U.S.C. §2254(d).

We have no difficulty in concluding that the evidence before the superior court would have supported a factual finding that strategic decisions were made. That hypothesis would seem to be the most reasonable one given the general quality of counsel's trial performance and the fact that it would appear to have been in Reynolds' best interest not to seek a mistrial. In that way, he could see what the jury would do with the state's weak evidence and, if he was convicted, the then existing Delaware law did not appear to foreclose him from raising his due process objections later. If counsel deliberately chose this

course, it would clearly have been permissible trial strategy not to resurrect the state's opening by asking for a curative instruction.

While we are thus confident that the evidence before the Superior Court would support a factual finding of strategic decision making, we are less confident about the district court's holding that it was required by 28 U.S.C. §2254(d) to presume that such decision making occurred. Before the presumption provided in Section 2254(d) arises, it must appear that "the merits of the factual dispute [in the district court] were resolved in the State Court hearing." 28 U.S.C. §2254(d)(1). While the issue found crucial by the district court was whether deliberate strategic decisions were made, the holding of the superior court was that Reynolds' counsel either overlooked the issue *or* made a strategic decision, neither of which would constitute cause under *Conyers* and *Sykes*. While we acknowledge that there is language in the superior court's opinion from which it can be inferred that it believed strategic decisions were made, the superior court's statement of its ultimate conclusion and its focus on the *Conyers* cause issue make the district court's approach to the *Fay v. Noia* issue problematic.

Nevertheless, we will assume, consistent with the district court's approach, that Reynolds' counsel made strategic decisions not to request a mistrial and not to ask for a curative instruction. We do so because our present task – reviewing the district court's refusal to reach the merits of Reynolds' due process arguments – does not require us to determine whether or not such decisions

were made.[6]. We may assume *arguendo* that strategic decisions were made because the district court's refusal was inappropriate even if strategic decisions were made.

While we thus accept that Reynolds' counsel made strategic decisions not to move for a mistrial and not to ask for an instruction, we emphasize before proceeding with out legal analysis that neither the superior court nor any other court has found that Reynolds' counsel made a strategic decision *to forego state process in order to seek federal habeas corpus relief.* Nor is there any reason to infer such an intent. As we pointed out in *Reynolds I,* Reynolds' counsel at the time of the trial had no reason to anticipate that the failure to ask for a mistrial or a jury instruction (or even the failure to raise the confession issue on direct appeal) would bar consideration of Reynolds's due process claims in a state post-conviction relief proceeding under Rule 35.

III.

In *Fay v. Noia,* Noia, the petitioner, claimed that he had been convicted on the basis of a coerced confession in violation of the Fifth and Fourteenth Amendments. He had not appealed his conviction, however, and he was subsequently denied state post-conviction relief because

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[6] Because the district court on remand will be required to reach the merits of Reynolds' unfair trial due process claims, and because Reynolds has withdrawn his constitutionally ineffective assistance claims, we do not foresee that the district court will again be required to decide whether the superior court "resolved" the "strategic decision" issue within the meaning of §2254(d)(1) and we express no opinion on that issue.

of this failure to appeal. The Supreme Court held that he was entitled to federal habeas review of his contention that he was being confined in violation of the federal Constitution.

The Court in *Fay* viewed its task as determining "the proper accommodation of [the] great constitutional privilege [of habeas review] and the requirements of the federal system." 372 U.S. at 426. It reaffirmed the power of a federal habeas court to grant relief from unconstitutional state confinement where state courts have rejected or refused to consider the petitioner's constitutional argument. The limitations which it recognized on the appropriate exercise of that power were grounded in federalism and the necessity of comity between the federal and state court systems.

The Court noted the exhaustion doctrine codified in 28 U.S.C. §2254, observing that "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Id.* at 419-20, quoting from *Darr v. Burford*, 339 U.S. 200, 204 (1950). The *Fay* court held, however, that the exhaustion doctrine of §2254 barred federal review only when there were state remedies still available to the petitioner at the time of his petition. 372 U.S. at 434-35.

The *Fay* court also held that the "independent and adequate state ground" doctrine that barred direct review by the Supreme Court of state judgments having a basis in state law should not be applied to bar habeas review in federal district courts. Thus, the fact that a habeas petitioner had violated a state procedural rule and was

thereby barred from further state review of a federal constitutional issue did not alone foreclose federal habeas relief. 372 U.S. at 428-34.

The *Fay* court nevertheless did recognize that there were situations not covered by the exhaustion doctrine in which the "exigencies of federalism" counselled against federal habeas review:

> [T]he exigencies of federalism warrant a limitation whereby the federal judge has discretion to deny relief to one who has deliberately sought to subvert or evade the orderly adjudication of his federal defenses in the state courts.
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> * * *
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> We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has *deliberately bypassed the orderly procedures of the state court and in doing so has forfeited his state remedies.*

372 U.S. at 433, 438 (emphasis supplied).

The *Fay* court's conclusion with regard to the "independent and adequate state ground" doctrine was subsequently abandoned in *Wainwright v. Sykes*, 433 U.S. 72 (1977), because it was "based on a conception of federal/state relations that undervalues the importance of state procedural rules." *Coleman v. Thompson*, 111 S. Ct. 2546, 2565 (1991). Where state review of a federal claim is barred because of a habeas petitioner's noncompliance with a state procedural requirement, comity counsels that the independent and adequate state ground doctrine be applied to bar collateral access to the federal courts in the absence of a showing of "cause and prejudice."

> Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. . . . The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Coleman, 111 S. Ct. at 2555.

With this background, we turn to the "deliberate bypass" doctrine articulated in *Fay*. It is this doctrine that was applied by the district court to bar Reynolds' access to the federal courts after we had determined that such access was not barred by the independent and adequate state ground doctrine. The important point for present purposes is that, like the doctrines of exhaustion and independent and adequate state ground, the deliberate bypass doctrine finds its justification in comity concerns. A petitioner should not be able to secure federal relief if he has deliberately deprived the state judicial system of an opportunity to correct the alleged constitutional error. As articulated by the Supreme Court in *Fay*, the deliberate bypass doctrine is a waiver doctrine. "The classic definition of waiver . . . – 'an intentional relinquishment or abandonment of a known right or privilege' – furnishes the controlling standard." 372 U.S. at 439. The doctrine applied only when the "habeas applicant . . . understandingly and knowingly forewent the privilege of seeking vindication of his federal claims in the state courts." *Id.*

Fay's rationale for the deliberate bypass doctrine is inapplicable to the facts of this case. Reynolds did not understandingly and knowingly forego the privilege of seeking to vindicate his federal claims in the Delaware courts, nor have his counsel been found to have made a decision to bypass state process for federal. Accordingly, he cannot be said to have deprived the Delaware courts of the opportunity to pass on his constitutional contention. On the contrary, Reynolds tried to raise his federal claims in Delaware Superior Court and in the Delaware Supreme Court pursuant to Delaware's collateral review procedures. If his trial and appellate counsel made a strategic decision to bypass state trial and appellate procedures, it was on the basis of a state legal landscape in which they could go forward in the hope of an acquittal by the jury *and* raise the due process argument in a Rule 35 proceeding.

Because Reynolds' counsel could not have anticipated that their failure to raise the federal due process claims at trial and on direct review would prevent Reynolds from raising the claims in state collateral review proceedings, they could not have deliberately forfeited Reynolds' chance at state review of his federal claims. And, "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Court v. Allen*, 442 U.S. at 154.

The most helpful Supreme Court precedent in this context is *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). Newsome, the petitioner there, pleaded guilty in a New York state court to possessing heroin. He subsequently sought

federal habeas review of the constitutionality of the search of his person that disclosed the heroin. The respondent argued that, as a matter of federal habeas corpus law, a defendant who pleads guilty to an offense in a state court waives his right to federal habeas corpus review of any constitutional issues other than those involving the plea itself. The Supreme Court recognized that this was the general rule and explained the rule by reference to the deliberate bypass doctrine of *Fay*:

> A defendant who chooses to plead guilty rather than go to trial in effect deliberately refuses to present his federal claims to the state court in the first instance. *McMann v. Richardson, supra,* at 768. Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained. Cf. *Fay v. Noia,* 372 U.S. 391, 438.

The Supreme Court refused to apply the deliberate bypass rule in Newsome's case, however, because New York law allowed a defendant to plead guilty and ascertain what sentence he would receive and thereafter pursue all of his constitutional claims in the state appellate process. The Supreme Court held that, where a state voluntarily chooses not to give a conviction based on a guilty plea the normal preclusive effect in its own courts, there is no federal justification for denying federal habeas review of federal constitutional issues.[7] So long as the

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[7] In the name of federalism, the dissent insists that concern for a "State's interest in the finality of its criminal judgments" (Dis. typescript op. at 6) justifies a federal rule precluding

petitioner has complied with the procedure required by state law, his deliberate decision to avail himself of the benefits of pleading guilty should not bar federal review.

The Supreme Court stressed in *Lefkowitz* that applying the respondent's rule "would make New York's law a trap for the unwary" because defendants could understandably believe they had the option of availing themselves of the benefits of a guilty plea while preserving

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federal habeas review even in the absence of a state procedural default. *Lefkowitz*, as we read it, teaches that federalism requires federal courts to permit a state to determine how "final" its own judgments will be. New York had there decided that a New York criminal judgment based on a guilty plea would not preclude a subsequent challenge in the New York courts on constitutional grounds. The respondent urged a federal rule that would give greater finality to New York criminal judgments in federal habeas courts than New York had chosen to give its criminal judgments in its own courts. The Supreme Court rejected this suggestion, holding that judgments based on guilty pleas should be given the same degree of finality in federal habeas courts as the state entering the judgment would give it.

Because all human institutions are fallible, no judicial system of which we are aware has chosen to insist on absolute finality. Each judicial system strikes a balance between the stability concerns served by judgments that preclude further proceedings and the justice concerns served by rules permitting alleged injustices to be reviewed after judgment is entered. A state's position with respect to the necessity for contemporaneous objections necessarily reflects its judgment about how these conflicting concerns should be reconciled. The creation of a federal contemporary objection rule in this case, as urged by the dissent, would give Reynolds' criminal judgment greater finality in a federal habeas court than Delaware had chosen to give its judgments in its own courts at the time of Reynolds' trial. We believe this would be inconsistent with the federalism concerns of *Fay* and *Lefkowitz*.

their right to appellate review of their constitutional issues and might only later discover that they had inadvertently waived their right to federal habeas review.

We read *Lefkowitz* to hold that *Fay's* deliberate bypass doctrine is based on comity and that it does not bar federal habeas review in the absence of a procedural default under state law. *Lefkowitz's* teaching for this case seems clear to us. Just as New York law afforded state appellate review despite a guilty plea, Delaware law afforded state habeas review despite the absence of a contemporary objection. Since Reynolds, like Newsome, complied with the procedural requirements of the courts of his state and provided them with an opportunity to pass on his constitutional claim, he, like Newsome, cannot be said to have engaged in a deliberate bypass of state process. To hold otherwise would fashion from Delaware law no less of a "trap for the unwary" than a contrary result in *Lefkowitz* would have fashioned from New York law.[8]

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[8] Four years after *Lefkowitz*, in *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), the Supreme Court considered the case of three habeas petitioners who complained that they had been convicted of firearms possession in state court on the basis of an unconstitutional state evidentiary presumption. Only after they had been convicted did the petitioners raise the federal issue in state court. In the ensuing federal habeas proceeding, the respondent argued that review was precluded by the deliberate bypass doctrine. *Id.* at 146. The Supreme Court ruled that the petitioners were entitled to federal habeas recourse because the state had never adopted a clearly applicable contemporaneous-objection policy. *Id.* at 150. The Court expressed no concern that the petitioners' failure to raise their federal objection until after the jury's verdict was announced might actually

We believe *Lefkowitz's* reading of *Fay* is inconsistent with the interpretation which the Court of Appeals for the Seventh Circuit has given to the deliberate bypass doctrine. In *Brownstein v. Director of Illinois Dep't of Corrections*, 760 F.2d 836 (7th Cir. 1985), *cert. denied*, 474 U.S. 858 (1985), the court held that federal habeas review is barred, even in the absence of a procedural default by the petitioner under state law, where the petitioner engaged in "strategic behavior" in the state court. *Id.* at 841. In that case, the state trial judge had neglected to secure an

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have been a "deliberate" or "strategic" decision by the petitioners. It saw comity as the sole relevant issue and rejected the respondent's position because "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *Id.* at 154.

In *Lefkowitz* and *Ulster County*, state appellate courts had addressed the petitioners' federal claims on their merits. This does not distinguish *Lefkowitz* and *Ulster County* from this case, however. Under the federal habeas law we applied in *Reynolds I*, where a respondent urges that there has been a procedural default, the claim must be treated as one involving no procedural default if, *inter alia*, (1) the state procedural requirement has not been enunciated in "unmistakable terms," (2) the state courts have not insisted on that requirement in petitioner's case and have reached the merits, or (3) the state courts have insisted on the requirements in petitioner's case but in doing so have acted in a manner inconsistent with other state cases. See footnote 4, *supra*. In cases where there has been no procedural default, or any alleged default that may have occurred does not meet these three criteria, there is no independent and adequate state law ground for the judgment. The absence of an independent and adequate state law ground in Reynolds' case is precisely the reason we permitted his habeas petition to go forward in *Reynolds I*, and it is what makes his situation equivalent to that of the petitioners in *Lefkowitz* and *Ulster County*.

express waiver of the petitioner's right to a jury trial prior to the petitioner's bench trial. The petitioner candidly admitted during his federal habeas hearing that he was aware during his trial both of his right to a jury and of the fact that his trial judge was committing reversible error by failing to secure an express waiver. He did not object, however, because his counsel believed he could "use the judge's omission to secure a new trial, should he lose the first time around." *Id.* at 839. Under Illinois law, no objection was required to preserve this specific issue, and a new trial was mandated even if no prejudice was shown.

The *Brownstein* court began by quoting *Fay's* holding: "The federal habeas judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in doing so has forfeited his state court remedies." *Id.* at 839. It seems to us that the court then proceeded to ignore this holding, finding that the petitioner was barred from federal habeas review under *Fay* by his "strategic behavior," even though he had neither "by-passed the orderly procedure of the state courts" nor "forfeited his state remedies."[9] We respectfully decline to follow suit.

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[9] We perceive some irony in the fact that *Brownstein* finds a "strategic behavior" bar implicit in *Fay.* In *Fay,* it will be recalled, the state procedural default was a failure to assert the coerced confession claim in a direct appeal. Noia made a deliberate decision not to appeal in part because he had not received a death sentence and feared he might receive one if convicted after a new trial. Only fourteen years later, after the state's ability to retry him in the absence of the confession had been impaired, did he seek collateral relief, first from the state and

We have found no Supreme Court case and no Court of Appeals case other than *Brownstein* that recognizes or gives content to the concept of "strategic behavior" outside the context of a state procedural default.[10] Moreover,

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then from the federal court. The Supreme Court recognized that Noia had obtained a benefit from his procedural default. His strategic behavior was of no moment, however, because "[u]nder no reasonable view can the State's version of Noia's reason for not appealing support an inference of deliberate bypassing *of the state court system.*" 372 U.S. at 439 (emphasis supplied).

[10] All but one of the habeas cases the district court cited as authority for refusing to entertain Reynolds' habeas petition involved bars to federal habeas review premised on state procedural default, forfeiture rules which the defendants and/or their counsel were or should have been aware of, or, equivalently, a petitioner's deliberate abandonment of state recourse in favor of collateral federal review. *See Reed v. Ross*, 468 U.S. 1, 8 & n.5, 10 (1984) ("Under North Carolina law, exceptions to jury instructions must be made after trial if they are to be preserved for appellate review, and errors that could have been raised on appeal may not be raised for the first time in postconviction proceedings."); *Wainwright v. Sykes*, 43 U.S. at 76 n.5 (Florida Rule Crim. Proc. 3.190(i) imposed a "contemporaneous objection rule"); *Henry v. Mississippi*, 379 U.S. 443, 445, 448 & n.3 (1965) (petitioner failed to comply with a Mississippi contemporaneous-objection requirement; procedural defaults in state proceedings do not prevent vindication of federal rights in federal court except "where state rule is a reasonable one and clearly announced to defendant and counsel"); *Beaty v. Patton*, 700 F.2d 110 (3d Cir. 1983) (rather than petition Pennsylvania Supreme Court for allocatur, defendant petitioned federal court for writ of habeas corpus); *United States ex rel. Abdul-Sabur v. Cuyler*, 653 F.2d 828 (3d Cir. 1981), *aff'd* 486 F. Supp. 1141, 1162 & n.31 (E.D. Pa. 1980) (Becker, Dist. J.) ("classic example of waiver"; "under Pennsylvania law, contemporary-objection is required to preserve an issue for appeal"), *cert. denied*, 454 U.S.

we think it would be unwise and unfair to impose upon defense counsel the burden of determining, on pain of having waived their clients' right to federal habeas review, not only whether each tactical trial choice is permissible under state law but also whether it may ultimately be considered by a federal court to constitute "strategic behavior."

Finally, we believe application of the Seventh Circuit's "strategic behavior" concept to bar federal habeas review in this case would do by way of federal law precisely what we said in *Reynolds I* Delaware could not do by way of state law – bar federal habeas review through the creation and retroactive application of a contemporaneous objection rule Reynolds' counsel had no reason to anticipate. Clearly, the Supreme Court could impose a "strategic behavior" restriction on access to federal habeas review as the dissent suggests. We do not believe it has done so, however. Further, having determined, as we recognized in *Reynolds I*, that states may not bar federal habeas review under the independent and adequate state ground doctrine of *Sykes* by unfairly

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1088 (1981); *Green v. Rundle*, 452 F.2d 232, 236-37 (3d Cir. 1971) (under Pennsylvania law, motions to sever multiple indictments and motions regarding jury instructions must be made on timely basis).

The final habeas case relied upon by the district court is *Estelle v. Williams*, 425 U.S. 501 (1976), which we understand to have granted habeas review and to have addressed the merits of the petitioner's claim. *Estelle* ruled that, because the petitioner had not asked to wear civilian clothing during his state trial, the state could not have "compelled" him to be tried in prison clothing in violation of the Fourteenth Amendment. 425 U.S. at 512-13.

applying a new contemporaneous objection rule retroactively, we doubt that the Supreme Court would see fit to create and retroactively apply a contemporaneous objection rule of its own.[11]

IV.

The judgment of the district court will be reversed, and this proceeding will be remanded to the district court for consideration of the merits of Reynolds' petition.

SLOVITER, *Chief Judge, dissenting.*

Last term in *Brecht v. Abrahamson,* 113 S. Ct. 1710, 1719 (1993), the Supreme Court reiterated the principle that state court convictions should be challenged primarily through direct review. The Court emphasized, as it has before, that the Great Writ of habeas corpus is to be reserved for extraordinary situations:

> The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence. Direct review is the principal avenue for challenging a conviction. "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal

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[11] *Cf. Ford v. Georgia,* 111 S. Ct. 850, 858 (1991) (retroactively applied state procedural-default rule not adequate to preclude direct review by U.S. Supreme Court of equal protection attack on state court judgment).

> courts are not forums in which to relitigate state trials."
>
> In keeping with this distinction, the writ of habeas corpus has historically been regarded as an extraordinary remedy, "a bulwark against convictions that violate 'fundamental fairness.' " "Those few who are ultimately successful [in obtaining habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation."

Id. at 1719 (citations omitted).

Significantly, the Court also noted that "it hardly bears repeating that 'an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment,' " *Id.* at 1720 (internal citations omitted), and that " '[l]iberal allowance of the writ . . . degrades the prominence of the trial itself' and at the same time encourages habeas petitioners to relitigate their claims on collateral review," *Id.* at 1720-21 (citation omitted).

In this case, the majority "ha[s] no difficulty in concluding that the evidence before the [state] court would have supported a factual finding that strategic decisions were made." Maj. typescript op. at 16. Nonetheless, the majority concludes that federal habeas relief is not barred under *Fay v. Noia*, 372 U.S. 391 (1963), because counsel's decision was made in a "legal landscape in which they could go forward in hope of an acquittal by the jury *and* raise the due process argument in a Rule 35 proceeding." Maj. typescript op. at 21. I respectfully dissent because I believe that the extraordinary remedy of habeas corpus is

not meant to grant relief to someone who deliberately and strategically declined the opportunity to assert his rights during his state trial and direct appeal.

I.

Although the majority "assume[s] *arguendo*" that *Fay* "retains independent vitality" subsequent to the Supreme Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), *Murray v. Carrier*, 477 U.S. 478 (1986), and *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), it does so only grudgingly, stating that there is "substantial support" for the view that *Sykes*' "independent and adequate state law ground" has "subsumed the 'deliberate bypass' rule of *Fay*." Maj. typescript op. at 11. Because the viability of *Fay* underlies my approach to this case, I discuss it notwithstanding the majority's concession.

One of two principal prongs of the *Fay* holding was that a state procedural default did not constitute a bar to federal court review under the federal habeas statutes comparable to the bar of direct Supreme Court review effected by an adequate and independent state law ground. The other prong gave discretion to the federal courts to deny relief to a petitioner who had deliberately bypassed the orderly procedure of the state courts and, in so doing, forfeited available state court remedies. *See Fay*, 372 U.S. at 428-35.

Fourteen years later, after gradual erosion of the first prong of the *Fay* rule, the Supreme Court in *Sykes* reinvigorated the independent and adequate state ground basis of precluding of federal habeas review because of procedural defaults. Instead of *Fay's* "deliberate bypass"

rule, the Court applied the "cause and prejudice" test to procedural defaults. The suggestion here by the majority that a procedural default may be tested only under the "cause and prejudice" test disregards the context in which the *Sykes* rule replaced that of *Fay*.

It is no surprise that the Court itself has characterized the *Fay* "deliberate bypass" test as a "lower standard" than that it adopted under the "cause and prejudice" test. *See Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1720 (1992). *See also Sykes*, 433 U.S. at 87 (the "cause" and "prejudice" standard is "narrower" than the *Fay* test). *Fay* was supplanted because the Court was uncomfortable with "an all-inclusive rule rendering state contemporaneous objection rules ineffective to bar review of underlying federal claims in federal habeas proceedings – absent a 'knowing waiver' or 'deliberate bypass' of the right to so object." *Id.* at 85. In light of that background, the principles and purposes behind habeas corpus, the policy against relitigation of matters that have been concluded, and the Court's recent jurisprudence, it is not likely that the Supreme Court would disapprove the continued vitality of the *Fay* "deliberate bypass" test in a situation like the present one where this court held the "cause and prejudice" test unavailable.[1]

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[1] Although the majority accepts without discomfort our holding in *Reynolds v. Ellingsworth* (*Reynolds I*), 843 F.2d 712, 719 (3d Cir.), *cert. denied*, 488 U.S. 960 (1988), I cannot avoid some comment on the curious nature of that decision. As the majority notes, the Superior Court of Delaware, affirmed by the Supreme Court of Delaware, held that Reynolds had waived his right to object to the prosecutor's opening comments and the court's failure to *sua sponte* give a curative instruction because he failed

II.

One of the bases for the current habeas jurisprudence is the view expressed in *Sykes*, over a strong dissent by Justices Brennan and Marshall, that the *Fay* test was not sufficiently respectful of the states' interests in their procedural default rules. The Court explained:

> We think that the rule of *Fay v. Noia*, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.

433 U.S. at 89.

The Court again stressed the significance of state procedural rules in *Keeney*, 112 S. Ct. at 1720, where it held that the "cause and prejudice" test was applicable to a petitioner's negligent failure to develop material facts in the state court proceeding. The Court noted that "[i]n *Wainwright v. Sykes*, we rejected the application of *Fay's* standard of 'knowing waiver' or 'deliberate bypass' to

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to make a contemporaneous objection as required by the Delaware Supreme Court's earlier opinion in *Conyers v. State*, 422 A.2d 345, 346 (Del. 1980) (per curiam). Nonetheless, despite the fact that in this very case the Delaware Supreme Court acknowledged that *Conyers* had enunciated such a rule, this court held that the absence of a governing "specific Delaware procedural rule" precluded our finding that *Conyers* constituted an adequate and independent state procedural ground supporting default.

excuse a petitioner's failure to comply with a state contemporaneous-objection rule, stating that the state rule deserved more respect than the Fay standard accorded it." *Id.* at 1718 (citation omitted). The Court referred to its decision the year before in *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), where "we described *Fay* as based on a conception of federal/state relations that undervalued the importance of state procedural rules." *Keeney*, 112 S. Ct. at 1718-19. In *Coleman*, the Court had stated:

> The cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay*. These incompatible rules are based on very different conceptions of comity and of the importance of finality in state criminal litigation.

111 S. Ct. at 2563.

A *fortiori*, habeas impinges at the very heart of federalism principles. The majority opinion's view that the federalism concerns that underlie *Sykes'* and *Fay's* default rules do not exist when there is no "independent and adequate" state procedural bar is belied by the Court's holding in *McClesky v. Zant*, 499 U.S. 467, 493 (1991). Even though there had been no state procedural default because the case arose in the context of the abuse of writ doctrine (which can be viewed as a default in a prior federal habeas petition), the Court recognized that federalism concerns are still implicated. It commented that "the doctrines of procedural default and abuse of the writ are both designed to lessen the injury to a State that results through reexamination of a state conviction on a ground that the State did not have the opportunity to

address at a prior, appropriate time; and both doctrines seek to vindicate the State's interest in the finality of its criminal judgments." *Id.*

Admittedly in this case there may not have been a concerted effort to bypass all state review in favor of federal court review, but federalism, although an important rationale for habeas jurisprudence, is not the only consideration. The emphasis in *McClesky* on the significance of finality of criminal convictions ("Without finality, the criminal law is deprived of much of its deterrent effect." *Id.* at 491 (quotations omitted)) has been a frequent theme in habeas cases. *See e.g., Keeney,* 112 S. Ct. at 1718 ("The writ strikes at finality of a state criminal conviction, a matter of particular importance in a federal system.").

Moreover, the procedural default rules, including as well the *Fay* "deliberate bypass" test, are based, in part, on equitable principles. Thus, the holding of *Fay* "that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies" is based on the equitable principle that "a suitor's conduct . . . may disentitle him to the relief he seeks." 372 U.S. at 438.

III.

The majority assumes, as indeed it must in light of the state court's evidentiary findings, that, in the words of the Delaware Supreme Court, "a strategic choice was made" by Reynolds' counsel in failing to object. App. at 10. Nonetheless, the majority concludes that despite these

findings Reynolds' failure to object did not amount to a "deliberate bypass." Such a constrictive approach to "deliberate bypass" is inconsistent with the *Fay* Court's own explanation of what it encompasses:

> The classic definition of waiver enunciated in *Johnston v. Zerbst*, 304 U.S. 458, 464 – "an intentional relinquishment or abandonment of a known right or privilege" – furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits.

Fay 372 U.S. at 439.[2]

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[2] Notwithstanding the language of *Fay* requiring that the bypass be personal, and not that of the defendant's attorney, later cases have held that a litigant is bound by the conduct of his attorney. *See Henry v. Mississippi*, 379 U.S. 443, 451 (1965) ("[C]ounsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here."); *see also McClesky*, 499 U.S. at 494 ("Attorney error short of ineffective assistance of counsel . . . does not constitute cause and will not excuse a procedural default."); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."); *see generally Link v. Wabash R.R. Co.*, 370 U.S. 626,

No Supreme Court decision supports the majority's view that Reynold's "strategic choices" did not constitute a "deliberate bypass" merely because Reynolds could have believed that he could bring his claim in a Rule 35 proceeding and therefore was not attempting to bypass the state courts.[3] Indeed, the only court of appeals to have considered the issue decided that a strategic decision not to raise an objection constituted a deliberate bypass. In *Brownstein v. Director, Illinois Dep't of Corrections*, 760 F.2d 836 (7th Cir.), *cert. denied*, 474 U.S. 858 (1985), the state court failed to admonish defendant Brownstein of his right to a jury trial. Brownstein knew that he was entitled to a jury trial, and could have asked for it but "deliberately chose to have two chances at acquittal," *id.* at 843-44, because his counsel believed he could "use the judge's omission to secure a new trial should he lose the first time around." *Id.* at 839. Despite the fact that there was no state court finding of procedural default to which the *Sykes* "cause and prejudice" rule would apply (because the state court had erroneously found there had been notice and waiver of a jury trial), the federal courts, both district and court of appeals, found a deliberate bypass under *Fay*.

The facts are strikingly similar to those here. In *Reynolds I* the *Sykes* "cause and prejudice" test was also

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633-34 (1962) ("Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.").

[3] We note in passing that there was no testimony by counsel that they had, in fact, adopted the plan hypothesized by the majority.

found inapplicable. The majority's scenario for the strategy of counsel is that they, as did counsel in *Brownstein*, sought two chances, a jury acquittal or subsequent new trial. It follows that the reasoning of the Seventh Circuit is of particular relevance. In holding that "*[Fay v.] Noia* enables us to look beyond the state procedural rules themselves," *id.* at 842, the *Brownstein* court looked to equitable considerations under which " 'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks.' " *Id.* (quoting *Fay*, 372 U.S. at 438). The Court thus held that "[i]n our judgment, [*Fay v.*] *Noia* goes beyond procedural defaults and allows federal judges to deny habeas relief whenever the petitioner's strategic behavior clearly requires it." *Id.* It continued, "the deliberate by-pass standard of *[Fay v.] Noia*, relying on general equitable principles, does not require the by-pass of a requirement; *the passing by of a mere opportunity may be enough*, and in this case is enough, to call that standard into play." *Id.* (emphasis added). The court thus concluded, "Although [Brownstein] did everything state procedural rules required, [he] did not do everything he could have; and the reason he did not was a strategic one: he wanted the chance of another trial, if he lost the first time. . . . We hold that he is not entitled to federal relief." *Id.* at 844.

The majority, by disapproving the result reached by the Seventh Circuit, thus creates a circuit split. Although it purports to find support in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975) and *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), neither of those cases is applicable. In both cases, unlike here, the state appellate courts had

heard the merits of the petitioners' claims notwithstanding the claimed procedural defaults. Both Supreme Court opinions gave that as a significant reason why consideration on the merits by a federal court was not barred. *See Lefkowitz*, 420 U.S. at 292 n.9 ("But the Court also held that if the state courts have entertained the federal constitutional claims on the merits in a subsequent proceeding, notwithstanding the deliberate bypass, the federal courts have no discretion to deny the applicant habeas relief to which he is otherwise entitled.") (citations omitted).

The majority relies on the statement in *Allen* that "if neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *Allen*, 442 U.S. at 154. One difficulty with the majority's position is that the state courts did indicate that they viewed Reynolds' federal constitutional claim as barred by some state procedural rule and refused to hear his claim. The fact that this court did not agree with the state courts' interpretation of their own procedural rule, *see* dissent note 1 *supra*, and held that it was not "adequate and independent," *Reynolds I*, 843 F.2d at 719, does not mean that we can pretend that the state courts heard this claim on the merits when they did not.

It is important to note that notwithstanding the majority's skepticism that trial counsel "deliberate[ly] bypassed" the claim relating to the opening statement in the state trial court, the record is clear that appellate counsel made a deliberate decision not to raise the issue on direct appeal for tactical purposes. He testified:

> Q. Do you know the reason that was not raised on appeal?
>
> A. The reason it was not raised on appeal was because, as far as I am concerned, the better grounds for appeal were the interpretation of the stipulation regarding the truth serum and also the very good ground of the newly-discovered evidence when we had the investigating officer saying he believed the wrong man had been convicted.

App. at 77. Thus the case cannot be governed by *Lefkowitz* and *Allen*, where counsel raised the issue in the state appeals courts. Nor is it like the decision of Noia not to appeal, also cited by the majority as governing here. As Justice Brennan noted, had Noia appealed he would have run a substantial risk of electrocution. Thus, he stated, "under the circumstances [Noia's choice] cannot realistically be deemed a merely tactical or strategic litigation step." *Fay*, 372 U.S. at 440. On the other hand, Justice Brennan continued, "[t]his is not to say that in every case where a heavier penalty, even the death penalty, is a risk incurred by taking an appeal or otherwise foregoing a procedural right, waiver as we have defined it cannot be found. Each case must stand on its facts." *Id.*

Essentially, the "deliberate bypass" by Reynolds' counsel of the opportunity to object when it might have had a curative effect gave the district court the discretion to decline to exercise its habeas jurisdiction, and its decision to do so was reasonable. The Supreme Court has repeatedly warned against using habeas to "give litigants incentives to withhold claims for manipulative purposes and [] establish disincentives to present claims when

evidence is fresh." *McClesky*, 499 U.S. at 491-92. *See also Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (" 'liberal allowance of the writ . . . ' encourages habeas petitioners to relitigate their claims on collateral review"); *Keeney*, 112 S. Ct. at 1718 (Habeas review "may give litigants incentives to withhold claims for manipulative purposes.").

There are powerful reasons to discourage a defendant from bypassing opportunities to object during his trial. As the Supreme Court stated in *Estelle v. Williams*, 425 U.S. 501, 508 n.3 (1976), a case cited by the majority, "if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation."

One of the goals of procedural default rules is to encourage full factual development in state court. *See Coleman*, 111 S. Ct. at 2563. *See also Brecht*, 113 S. Ct. at 1721 ("state courts often occupy a superior vantage point from which to evaluate the effect of trial error"). This consideration was referred to expressly in *Sykes* where the Court noted the benefits of rules requiring defendants to make their objections during trial:

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question. . . .
>
> A contemporaneous-objection rule may lead to the exclusion of the evidence objected to,

> thereby making a major contribution to finality in criminal litigation . . . the jury may acquit the defendant, and that will be the end of the case; or it may nonetheless convict the defendant, and he will have one less federal constitutional claim to assert in his federal habeas petition. . . . An objection on the spot may force the prosecution to take a hard look at its hole card.

433 U.S. at 88-89 (footnote omitted).

Perhaps the Court gave the most succinct summary of the rationale for its habeas jurisprudence in *Sykes* where it stated: "the state trial on the merits" should be "the 'main event,' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." 433 U.S. at 90.

On remand from this court, the district court made the "deliberate bypass" inquiry and found that it was bound by the findings of the state evidentiary hearing, which "was by all accounts full, fair, and adequate." *Reynolds v. Ellingsworth*, 1992 WL 404453, at *8 (D.Del. Dec. 31, 1992). Based on those findings and the court's review of the record, the court concluded that Reynolds' attorneys chose not to object to the prosecutor's opening statement, preferring "to gamble that the jury would forget the references and eventually find Reynolds not guilty in light of the scanty case presented by the State." *Id.* at *9. That was "precisely the kind of calculated decision that *Henry v. Mississippi* and related precedent warned against." *Id.* The court concluded, similar to the holding in *Brownstein*, that "[a] defendant in state court may not, in short, use federal habeas proceedings as a

hedge against the chance that his or her guess with regard to the jury will turn out to be incorrect." *Id.*

I agree with the district court. Reynolds took his chances and he lost. He engaged in the kind of strategic behavior that disentitles him to habeas relief.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7106

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, Warden;
CHARLES M. OBERLY, III

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and LEWIS, *Circuit Judges*, and RESTANI,* *Judge, United States Court of International Trade*

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

Chief Judge Sloviter and Judge Cowen would have granted rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: JUN 13 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-7106

GEORGE L. REYNOLDS,

Appellant

v.

JACK C. ELLINGSWORTH, Warden;
CHARLES M. OBERLY, III

On Appeal From the United States District Court
For the District of Delaware
(D.C. Civil Action No. 86-00142)

Present: SLOVITER, *Chief Judge;* STAPLETON, *Circuit Judge;* and, RESTANI,* *Judge United States Court of International Trade*

JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel November 3, 1993.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered January 5, 1993, be, and the same is hereby reversed and the cause remanded to the said

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* Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

District Court for reconsideration of the merits of Reynold's petition. Costs taxed against appellee.

ATTEST:

Clerk

Dated: May 2, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS, Petitioner, v. JOHN C. ELLINGSWORTH, Warden, et al., Respondents.	)	Civil Action No. 86-142-JRR

Beverly L. Bove, Esquire of Tomar, Seliger, Simonoff, Adourian & O'Brien, Wilmington, Delaware
Attorney for Petitioner

Loren C. Meyers, Esquire of State of Delaware, Department of Justice, Wilmington, Delaware
Attorney for Respondents

OPINION

Wilmington, Delaware
December 31, 1992

/s/ Jane R. Roth
Roth, Circuit Judge[1]

In 1977 George Lee Reynolds was tried in the Delaware Superior Court in connection with the November 29, 1974 murder of Frank Snyder. Reynolds' alleged role

[1] United States Court of Appeals for the Third Circuit, sitting by designation.

in the murder was to drive two co-defendants to and from the murder scene. In his opening statement at Reynolds' trial, the prosecutor focused almost entirely on two statements Reynolds had made to the police. Well into the trial, the prosecutor attempted to introduce these statements into evidence. The defense, however, objected to their admission because they were taken outside the presence of counsel, in violation of Reynolds' Sixth Amendment rights. Rather than press the issue to a ruling from the trial judge, the prosecutor decided to withdraw his offer of the statements. At this point, defense counsel neither objected to the opening remarks about the two statements nor moved for a mistrial on this ground. Nor did the trial judge ever give a curative instruction regarding the remarks. Further testimony was presented, and the trial concluded with the jury having heard very little evidence – all of it circumstantial and highly controverted – connecting Reynolds to the murder.

The jury convicted Reynolds of first degree murder, first degree robbery, and second degree conspiracy. Reynolds' co-defendants, who allegedly were the central perpetrators of the murder, were each tried separately. One, John Rooks, received a directed verdict of acquittal. The other, Thomas Young, was convicted of first degree murder, first degree robbery, possession of a deadly weapon during the commission of a felony, and second degree conspiracy. Young, however, successfully challenged his conviction with newly discovered evidence that cast doubt on the veracity of the State's star witness against all three co-defendants. He later pled guilty to manslaughter.

After Reynolds exhausted his state remedies in a series of challenges to his own conviction in the Delaware courts, he instituted the present petition for habeas corpus relief under 28 U.S.C. § 2254 (1988). Now that the case has returned after a short detour in the Court of Appeals, Reynolds asks this court to decide whether his trial was rendered fundamentally unfair by the prosecutor's opening statement. We have reviewed the entire record in this case. While we believe that a strong case can be made for Reynolds' contention that his trial was not fundamentally fair, we are constrained to deny the writ because of the state courts' finding that Reynolds' counsel failed to object to the opening statement for tactical and strategic reasons. Under Supreme Court precedent, this deliberate bypass of the opportunity to object bars any relief stemming from the opening statement.

I.

The prosecutor's opening statement, which is the source of the present controversy, included extensive reference to Reynolds' two March, 1976, statements that, according to the State, served as confessions of guilt. After introducing himself, the prosecutor began his opening statement by explaining a number of legal concepts unrelated to the facts of the case, including guilt beyond a reasonable doubt, innocence until proof of guilt, impartiality of jurors, and the role of the trial judge as the arbiter of law. Appendix[2] [herein after "App."] at 165-70.

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[2] Appendix to Respondents' Supplemental Memorandum, July 24, 1989, D.I. 26A.

He then outlined when and where the crime took place and stated that there were witnesses to not only the murder but also to a conspiracy to commit the murder. He then explained the elements of a conspiracy, and noted that the State was charging the defendant with murder, robbery, and possession of a deadly weapon. After alluding to the fact that a knife was left in the victim's back, the prosecutor next told the jurors to observe the demeanor of the witnesses and said that not all witnesses need be believed. He then addressed for the first time in specific detail the evidence that would be presented. What follows is a verbatim transcript of the entire balance of the prosecutor's opening statement:

> Now as I have already mentioned, this crime occurred on the 29th day of November, 1974. That is the day after Thanksgiving.
>
> The person who you are here to hear evidence with respect to today, George Lee Reynolds, was arrested on the 31st day of March, 1976. That is roughly sixteen months after the crime.
>
> It is extremely important that you remember the passage of sixteen months. Now, the police weren't sitting around the barracks drinking coffee for sixteen months. The police were actively looking for the murderer of Frank Snyder.
>
> You will see evidence that one of these participants of the murder of Frank Snyder practices a type of voodoo which leaves members of the community in extreme fear. You will hear evidence that the defendant in this case, George Lee Reynolds, a participant in the crime, held

back and refused to tell the police what happened because of his fear of the coconspirator. You will hear evidence that his coconspirator held such a trance over the defendant that the defendant was afraid to come forward and testify and yet you will hear evidence that sixteen months after the crime, after speaking with another prison inmate about what he knew about this crime and after talking and receiving counsel from his father, one Jessie Lee James, he got it off his chest. He told the police about the crime and I believe that the testimony will reveal that he told the police about this crime on the 28th day of March, 1976.

But, it's a kind of funny statement, members of the jury panel. He tells about the crime and he tells about the crime with specific detail of things that no one could know unless they were there, details about the crime that had never been revealed in any publication. He told of details of the crime that had never been told to any newspaper or any radio station or to anybody except for the investigating officers.

George Lee Reynolds knew certain details about that crime. Furthermore, members of the jury, in addition to these details that he knew about the crime that you will hear about, he lied to us in addition. He told us half the truth. He didn't tell us all of the truth.

He said that he, Black Jesus and a fellow by the name of Louis were responsible for the crime and two days later he retracted the business about the fellow by the name of Louis. It was an obvious lie.

He substituted another name in there, a name of a friend that he knew was in California.

Now, these are things that I don't have the answers to. I am not going to explain the answers to them. These are things that you are going to hear and when you hear them you are going to have an obligation and a duty.

A duty is, members of the jury panel, to sift through the information and determine is George Lee Reynolds telling the truth on the 28th of March? Is he telling us the truth on the 31st of March, because a little later on you are going to hear George Lee Reynolds say he made it all up to collect the reward.

In other words, George Lee Reynolds retracted his story. How is it he retracted his story but he can't retract, members of the jury panel, those specific items that are of specific knowledge to the crime that George Lee Reynolds had when he "made up that story?"

He tells us that when he changed the story the first time, the reason he didn't tell all the truth was because he was afraid of Black Jesus, that he was afraid of his coconspirator. He said, "That man can do a root on you," meaning you better be careful because he can put it to you. "That man can do a root on you," meaning he can make you get sick and die.

Other witnesses also refused literally to testify. You will hear a witness refuse to testify. You will see a witness refuse to testify. You will hear one witness who will come forward, Miles Cuffee, and explain to you about the root and tell you what he heard when he was in jail about the crime from the lips of the defendant, George Lee Reynolds.

> This is not an easy case for you to sit and sift evidence on the first time that you have all sat as jurors. This is not an open and shut case. This is not a case where the State, myself, the prosecutor, is going to present a witness that says I saw it happen without that same statement being retracted which is why it is all the more important for you, as members of the jury panel, to pay close and sharp attention as you possibly can.
>
> I seem to have lost track of myself. Perhaps it is best I do lose track of myself because if I can't remember what I was supposed to say it must not be very important at this point.

App. at 170-174. Thus ended the prosecution's opening statement. The opening statement of Reynolds' trial attorney, Joseph Hurley, was apparently not transcribed.

The early part of the trial that ensued was uneventful. The first twelve witnesses offered no evidence – circumstantial or otherwise – linking George Reynolds to the murder of Frank Snyder. The next phase of the trial consisted of a long hearing outside the presence of the jury regarding the admissibility of the results of the meetings that the police had had with Reynolds prior to his arrest. After witness testimony, but before argument on suppression of the four interviews began, the prosecutor alerted the trial judge to the fact that Reynolds' former attorney had, in March of 1976, spoken to the prosecutor, but that it was that lawyer's custom and habit to advise defendants not to talk. At this point, the prosecutor stated that he did not feel "in a position to argue affirmatively with respect to the statements of [March] 28th and 31st." The trial judge stated that no ruling was necessary

with regard to the March statements because they had been withdrawn. App. at 227. He also ruled that a February statement was admissible. App. at 228. The prosecutor then discussed some housekeeping details regarding exhibits; defense counsel, after apologizing for not "paying a hundred percent attention" to what was going on, joined in this discussion. App. at 229.

The trial continued with testimony from a detective who had interviewed Reynolds and thought that Reynolds' "body language" indicated some knowledge of the Snyder murder. After two more witnesses, the State put on Miles Cuffee, its star witness. As the Court of Appeals for the Third Circuit has noted in understated fashion,

> The only witness to link Reynolds to the crime was Miles Cuffee, himself a former suspect. Prior to trial, Cuffee gave the police at least seven different accounts of how he acquired knowledge of the crime. . . . Cuffee himself would only testify affirmatively at trial to two events: that Young, in Reynolds's presence, had asked Cuffee if he wanted "to rip somebody off," and that Cuffee had seen Young, who was wearing a bloody shirt, with Reynolds in a car on the day of the murder. . . . The judge instructed the jury to disregard as hearsay Cuffee's testimony regarding Young's statement to Cuffee.

843 F.2d at 715. Our review of the transcript of the trial reveals that Cuffee's testimony was hopelessly confused and contradictory, and was riddled with falsehoods. Cuffee admitted that, in contradiction to what he had told the police earlier, Reynolds had never stated that he had

participated in the crime. App. at 126. The prosecution put on various witnesses who attempted to rehabilitate Cuffee's tattered credibility, and then rested.

The defense presented a number of witnesses, beginning with a policeman who testified at great length concerning an interview with Cuffee that produced even more versions of Cuffee's story. Counsel for Reynolds then moved for judgment of acquittal. The trial judge held there was some credible evidence that Reynolds was present during a conversation between Young and Cuffee regarding a "rip-off," and denied the motion with regard to the most serious of the charges. Nevertheless, he granted a judgment of acquittal regarding possession of a deadly weapon. Trial Testimony at 396.

When the jury returned to the courtroom, they heard a tape recording of a February, 1976, interview of Cuffee. The tape cast further doubt upon Cuffee's story, as did further testimony from a police officer. The next witness was the defendant himself, who denied any involvement in the murder. Reynolds was followed by an inmate who knew Miles Cuffee well. This witness reported that Cuffee had told him that he had given the police false information and had mentioned a reward. The last defense witness was a psychiatrist who had given a sodium amytal "truth serum" test to Reynolds.

Counsel then gave their closing arguments. As noted above, the jury convicted Reynolds of first degree murder, first degree robbery, and second degree conspiracy.

Reynolds appealed his conviction to the Delaware Supreme Court, which remanded the case back to the Superior Court to consider newly discovered evidence.

The judge who had presided at Reynolds' trial found that the new evidence, if presented at trial, would not have changed the result. Reynolds then appealed to the Delaware Supreme Court once more, but that Court affirmed the conviction in 1980. *Reynolds v. State*, 424 A.2d 6 (Del. 1980). In affirming the conviction, however, the court stated that the foundation for the "body language" testimony given by Detective Perry at trial was "extremely thin" but nevertheless amounted to "little more than surplusage" because Reynolds had said, according to one prosecution witness, that he knew who committed the murder. *Id.* at 7. The court further held that the trial judge's refusal to permit the defense to play the tape of Reynolds' sodium amytal interview was not reversible error. Finally, the court affirmed the trial court's refusal during the hearing on a new trial to qualify the chief investigating officer as a fingerprint expert for the defense.[3]

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[3] Co-defendant John Rooks received a directed verdict of acquittal after the judge presiding over the Rooks trial found that Reynolds' statements of March 28 and 31, 1976 were inadmissible. *State v. Rooks*, 411 A.2d 316 (Del. 1980). Codefendant Tommy Young was convicted of the charges leveled against him, but the trial judge handling his case ruled that a new trial was appropriate in view of newly discovered evidence showing that Miles Cuffee, whose credibility was at the "heart and soul" of these prosecutions, might have perjured himself in testifying for the State in the same way he testified at the Reynolds' trial. See *State v. Young*, No. 77-09-0001-0004, slip op. (Del. Super. Oct. 4, 1982). Young then agreed to plead guilty to manslaughter, and no new trial was held.

Ironically, in 1986, a Delaware Superior Court judge denied Reynolds' second motion for a new trial based on a nearly identical attack on Cuffee's testimony and credibility. *State v.*

Following the affirmance of Reynolds' conviction, he moved in State court for post-conviction relief pursuant to the version of Delaware Superior Court Rule 35 in effect at the time. In this motion he claimed for the first time that the prosecutor's references to the March 28 and 31, 1976, "confessions" in the opening statement denied him due process under the Fifth and Fourteenth Amendments to the United States Constitution. He also alleged two other grounds for due process relief, namely that his counsel had failed to object to the opening statement and that the trial judge had failed to give a limiting instruction or declare a mistrial. The State argued in reply that Reynolds' failure to raise these claims at trial or on direct appeal was procedurally barred from review by the Delaware Supreme Court's decision in *Conyers v. State*, 422 A.2d 345 (Del. 1980), which case adopted the "cause and prejudice" test of *Wainwright v. Sykes*, 433 U.S. 72 (1977).

A different Superior Court judge held two days of evidentiary hearings regarding the reasons for the failure by Reynolds' defense counsel to raise these issues earlier. Both of Reynolds' attorneys testified, but neither had an independent recollection of the reasons for failing to object. However, the presiding Superior Court judge

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Reynolds, Nos. 76-04-0026; 0027; 0027A, letter op. at 3 (Del. Super. Jan. 30, 1986). The judge distinguished Young's case from Reynolds' by stating that Young had a better alibi; that Cuffee's brother – the source of the new evidence – was less concrete than he had been three years earlier and had been impeached and contradicted by the State's witnesses; and that there was "other evidence" of Reynolds's guilt, including "highly incriminating" statements to the police and others. *Id.* The Superior Court did not identify the latter statements.

ruled that trial counsel had viewed the withdrawal of the statements in question as a "substantial victory," and that counsel pressed on with the trial because they anticipated a victory. App. at 5. The judge also ruled that counsel did not seek a curative instruction because they feared calling the jury's attention to the remarks and wanted to avoid a mistrial because the prosecution would be given another opportunity to improve its case. App. at 6. These decisions were, according to the Superior Court judge, not the product of "either inadvertence or lack of knowledge of the applicable law." App. at 6. The Delaware Supreme Court affirmed the Superior Court. App. at 9.

Pursuant to 28 U.S.C. section 2254, Reynolds then filed a petition for writ of habeas corpus in this court, asserting that the prosecutor's reference to the March, 1976 "confessions" in his opening statement constituted prosecutorial misconduct; that the trial judge abused his discretion by failed *sua sponte* to instruct the jury to disregard the prosecutor's remarks; and that he had received ineffective assistance of counsel at trial when his lawyers failed to object to the remarks, move for a mistrial, or raise the issue on direct appeal.

The U.S. Magistrate Judge to whom the case was referred adopted the "*Wainwright v. Sykes*-type analysis" employed by the Delaware Superior Court judge who presided over the hearing on these issues, and determined that these claims were barred from review because trial counsel had made deliberate tactical decisions not to object to the remarks or move for a mistrial. He further recommended that the ineffective assistance of counsel claim be dismissed because the decision not to press the claim was a professionally competent one. Referring to

Strickland v. Washington, 466 U.S. at 690-91, the Magistrate noted that a disgruntled former client could not challenge the quality of representation after the attorney had made "thorough investigation of law and facts relevant to plausible options." Since these were, in the Magistrate's view, plausible choices, the ineffective assistance claim was dismissed. This Court adopted the Magistrate's Report and Recommendation and dismissed the petition.

Reynolds then appealed the dismissal of his petition to the United States Court of Appeals for the Third Circuit, which reversed and remanded. *Reynolds v. Ellingsworth*, 843 F.2d 712 (3d Cir.), *cert. denied*, 488 U.S. 960 (1988) ("*Reynolds I*"). The Court of Appeals held that in deciding whether claims waived in the state court should, under *Wainwright v. Sykes*, be overlooked, a district court should examine whether the purported state procedural bar was "independent and adequate" before analyzing whether there was "cause" for non-compliance with the procedural rule and "prejudice" resulting from the alleged constitutional violation. *Id.* at 717. The panel then decided that Delaware Rule 35, the basis of the Delaware courts' finding that Reynolds had waived his objections related to the prosecutor's opening remarks, was not an "independent and adequate state procedural ground." *Id.* at 719. The court remanded to this court, where Reynolds dropped his unexhausted, ineffective assistance claims. 843 F.2d at 724.

After the Third Circuit ruling, this Court referred the case to another U.S. Magistrate Judge in this District for a determination of the merits of Reynolds' claims that the prosecutor's remarks rendered his trial unfair. The Magistrate Judge decided that the trial was fundamentally

fair, and recommended dismissal. Even though the beneficiary of this recommendation, the State nevertheless objected to the Magistrate Judge's rejection of its argument that no fundamental fairness inquiry was necessary because Reynolds, rather than the prosecutor or the trial judge, had caused whatever unfairness there was at trial. In reviewing the entire case, we have duly considered the Magistrate's Report and Recommendation on this subject and the State's objections to it. 28 U.S.C. § 636 (1988). For the reasons that follow, we will deny Reynolds' petition.

II.

The State contends that even though the Court of Appeals has held that *Conyers* and Rule 35, taken together, were not an independent and adequate procedural bar to Reynolds' due process claim, the claim is nevertheless barred by his counsels' knowing tactical decision not to object to the prosecutor's opening statement. *See Wainwright v. Sykes*, 433 U.S. 72, 83 n.8 (1977) (deliberate bypass is a "separate adequate state ground"); *Beaty v. Patton*, 700 F.2d 110, 113 (3d Cir. 1983) ("deliberate bypass" inquiry is separate from inquiry into whether there was "cause and prejudice" for procedural default). After much consideration, we agree. Because of the deliberate bypass, we cannot reach what otherwise might be a meritorious due process claim.[4]

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[4] In reaching this decision we are mindful of Judge Higginbotham's observation in *Reynolds I* that petitioner's claim "is a violation of due process that stems not only from the decisions of counsel but also from prosecutorial over-reaching and the failure of the trial court *sua sponte* to give a curative

In *Fay v. Noia*, 372 U.S. 391 (1963), the Supreme Court commented that:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can be fairly described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits – though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.

372 U.S. at 439. The Court honed this doctrine in *Henry v. Mississippi*, 379 U.S. 443 (1965), where it reviewed on direct appeal a defendant's contention that his conviction should be invalidated because of the admission of illegal evidence. His counsel had failed to object, as required by Mississippi law, at the time of the introduction of the evidence, waiting instead until a later motion for a directed verdict at the close of the State's evidence. The Court noted that the State's interest in observance of the contemporaneous objection rule would have been served even by a late objection, so "enforcement of the contemporaneous-objection rule was less than essential and

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instruction." 843 F.2d at 722. When looking at all these factors and the meager and contradictory evidence supporting the conviction, we are very troubled by this case. However, we do not see how, under the constraints of Supreme Court precedent, we can do otherwise but deny Reynolds' petition.

therefore lacking in the necessary 'legitimacy' to make it an adequate state ground." *Wainwright v. Sykes*, 433 U.S. 72, 84 n.8 (1977) (explaining *Henry*). Rather than reach either this question or the merits of the constitutional claim, however, the *Henry* court remanded because:

> even assuming that the making of the objection on the motion for a directed verdict satisfied the state interest served by the contemporaneous-objection rule, the record suggests a possibility that *petitioner's counsel deliberately bypassed the opportunity to make timely objection* in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies.

379 U.S. at 449-50 (emphasis added). Noting that the evidence suggested that counsel might have planned either to use the evidence as a means of setting up impeachment of state witnesses or to invite error and lay a foundation for a subsequent reversal, the Court stated that:

> [i]f either reason motivated the action of petitioner's counsel, and their plans backfired, *counsel's deliberate choice of the strategy* would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trail [sic] strategy would have that effect in this case.

Id. at 451 (emphasis added). The *Henry* court conceded that, even if the state courts decided on remand that the petitioner had deliberately bypassed the objection requirement as part of trial strategy, he could pursue his federal claim in a federal habeas proceeding. Nevertheless, the federal habeas case could continue only "until it is shown that petitioner deliberately bypassed the orderly procedure of the state courts." *Id.* at 452.

In a later habeas case the Court captured the concerns addressed by the deliberate bypass rule:

> In general . . . defense counsel may not make a tactical decision to forego a procedural opportunity – for instance, an opportunity to object at trial or to raise an issue on appeal – and then, when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by federal court on habeas corpus review would not only offend generally accepted principles of comity, but would also undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, "inexcusable".

Reed v. Ross, 468 U.S. 1, 14 (1984) (citation omitted). Thus, it is clear that if – for strategic reasons – Reynolds deliberately bypassed objections to the prosecutor's opening statement, his due process claim may be barred.[5]

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[5] In *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), the Supreme Court held that the liberal *Fay v. Noia* "deliberate bypass" test, which permitted federal courts to reach the merits of habeas claims despite inadvertent procedural defaults, had been

Turning to the present case, our first task is to clarify the extent to which we must defer to the Delaware courts' factual[6] finding that the decision not to object to the prosecutor's statement or to move for a mistrial was an intentional one that was made for reasons of strategy. This issue is controlled, we think, by 28 U.S.C. section 2254(d), which provides in pertinent part that:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, *a determination after hearing on the merits of a factual issue, made by a State court* of competent jurisdiction in a proceeding to which the applicant for the writ and

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replaced in all cases by the more demanding "cause and prejudice" test enunciated in *Wainwright v. Sykes*. *Id.* at 2565 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). Even after *Coleman*, however, deliberate bypasses of the type described in *Fay* are still forbidden.

[6] The mere fact that an issue involves an inquiry into state of mind "is not at all inconsistent with treating it as a question of fact." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). As we have noted with regard to a defendant's awareness and understanding of his *Miranda* rights, "[t]he findings of state courts on these questions are purely factual in nature, involving a determination as to 'what happened' during an interrogation and often requiring that the state court choose between two conflicting accounts of the events to decide which is truthful." *Ahmad v. Redman*, 782 F.2d 409, 412 (3d Cir.), *cert. denied*, 479 U.S. 831 (1986). The same can be said of the mental state of Reynolds' attorneys.

the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct,* unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit –

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

. . .

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

. . . the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (emphasis added). *See also Townsend v. Sain*, 372 U.S. 293, 313-18 (1963).[7]

Under this statute, the Delaware court's factual determination that Reynolds' counsel intentionally decided not to object or move for a mistrial is presumed

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[7] In *Fay v. Noia*, the Court had stated that a "state's court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." 372 U.S. at 439. It is true that the federal courts need not defer to state court findings on questions of law or mixed questions of law and fact. Here, however, we are reviewing the Delaware courts' finding that Reynolds' counsel in fact consciously decided, for tactical reasons, not to challenge the statement at trial. The Supreme Court, in cases decided after *Fay*, has strongly implied that deference is due to state court findings of this nature:

> By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations. Such a disposition may make unnecessary the processing of the case through federal courts already laboring under congested dockets, or it *may make unnecessary the relitigation in a federal forum of certain issues.*

Henry, 379 U.S. at 453 (emphasis added).

This trend continued in *Estelle v. Williams*, 425 U.S. 501 (1976), where the Court was asked to decide whether an accused who is compelled to wear identifiable prison clothing at his trial by a jury is denied due process or equal protection of the laws. While recognizing the serious constitutional implications of this practice, the Court addressed instead whether trial counsel had, for strategic reasons, failed to object to his client being tried in prison garb. The Court reviewed the record developed in State court and determined that the petitioner's attorney was well aware of the problem, but did not voice his fear of adverse consequences. 425 U.S. at 509-512. The Court then concluded that:

to be correct, and the burden is on Reynolds to show by convincing evidence that it was erroneous. Because he has not pointed to any evidence that the Delaware courts were incorrect in this regard, the factual finding may be rejected only if it fits within one of the exceptions provided by section 2254. We have reviewed the transcript of the hearing conducted by the Delaware courts and conclude that the hearing does not fall within one of the statutory exceptions. The Delaware courts resolved this factual issue on the merits. The hearing was by all accounts full, fair, and adequate. Both sides were given the opportunity to present and examine witnesses. The material facts concerning the decision not to challenge the prosecutor's opening statement were fully developed – over the course of two days – through examination of

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> Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.
>
> Accordingly, although the State cannot, consistent with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Id. at 512-13. *Estelle* thus stands not only for the proposition that a federal court may base its determination of deliberate bypass on the state record alone, but also for the general rule that a *conscious* failure to object to a constitutionally defective development in a trial results in waiver of meritorious constitutional claims based upon that development.

both of Reynolds' trial attorneys. There is no indication that Reynolds was denied due process of law at the hearing on this issue. Finally, although Reynolds' trial attorneys were not able to summon crystal clear memories of the trial, we cannot say that the Delaware courts' ruling was not fairly supported by the record. In short, because Reynolds has not met his burden of demonstrating that the hearing in the state courts fell within one of the statutory exceptions, we are bound by section 2254 to accept the ruling that the actions of Reynolds' counsel were an intentional part of a trial strategy that failed. *See Brown v. Rundel*, 450 F.2d 517, 519 (3d Cir. 1971) (review of only state court transcript permissible); *LaMolinare v. Duggan*, 415 F.2d 730 (3d Cir. 1969) (deferring to state court finding of intentional waiver of opportunity to challenge evidence).

In light of this binding factual finding, our independent determination of whether, as a matter of law, a "deliberate bypass" occurred is not difficult. Reynolds' attorneys had ample opportunity during trial to alert both the prosecutor and the judge to the possibly troublesome issue posed by the opening statement; the suppression hearing, for example, was clearly an appropriate juncture. Instead of taking advantage of one of these opportunities to resolve the problem, they chose to gamble that the jury would forget the references and eventually find Reynolds not guilty in light of the scanty case presented by the State. This is precisely the kind of calculated decision that *Henry v. Mississippi* and related precedent warned against. A defendant in state court may not, in short, use federal habeas proceedings as a hedge against the chance that his or her guess with regard to the

jury will turn out to be incorrect. *See Wainwright v. Sykes*, 433 U.S. at 89 (disapproving of attorneys who "take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off"). For this reason, we hold that because of his counsel's intentional decision to forgo objection to the prosecution's opening statement, Reynolds is precluded from mounting a due process challenge to the effect of the statement upon the fairness of his trial.[8]

An appropriate order will follow.

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[8] The failure by the Delaware courts to address whether Reynolds himself subjectively intended to bypass a challenge to the opening statement does not change this result. First, Reynolds had the opportunity to develop this fact at the hearing conducted in the state court, but did not do so. More importantly, "[i]f *Fay v. Noia*, . . . was ever intended to require that every decision in the course of a state criminal proceeding include the defendant's personal participation before he is bound by it, we think that subsequent cases have limited that decision." *Green v. Rundle*, 452 F.2d 232, 236 (3d Cir. 1971) (citing to *Henry v. Mississippi*) (citations omitted). *See also Wainwright v. Sykes*, 433 U.S. at 91 n.14 (decisions of counsel relating to trial strategy, even where made without consultation of defendant, bar review except in exceptional circumstances); *Abdul-Sabur v. Cuyler*, 653 F.2d 828 (3d Cir. 1981) ("It is clear, however, that counsel's silence was not mere oversight. . . .

The Supreme Court has admonished defense lawyers that they may not 'take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.' ").

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No.**
	)	**86-142-JRR**
JOHN C. ELLINGSWORTH, Warden, et al.,	)	
	)	
	)	
Respondents.	)	

ORDER

THEREFORE, IT IS ORDERED on this 31st day of December, 1992, for the reasons stated in the Opinion issued on this date, that:

1. The Report and Recommendation of September 7, 1990 is hereby accepted by the Court.

2. Applicant is granted a certificate of probable cause to appeal.

3. The Clerk shall mail a copy of this Order to applicant.

/s/ Jane R. Roth
United States Circuit Judge

Dated: December 31, 1992

cc: Hon. Mary Pat Trostle

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS,	)	
Petitioner,	)	
	)	
v.	)	**Civil Action No.**
JOHN C. ELLINGSWORTH, ET AL.,	)	**86-142 – JRR**
	)	
Respondents.	)	

FINAL ORDER

This 2nd day of September, 1986 for the reasons stated in the Magistrate's Report and Recommendation, dated July 25, 1986.

Now, therefore, IT IS ORDERED that:

1. The Magistrate's Report and Recommendation is accepted and adopted by the Court.

2. The application for a writ of habeas corpus is hereby denied and the petition is hereby dismissed.

3. No probable cause exists for an appeal.

/s/ Jane R. Roth
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GEORGE L. REYNOLDS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Civil Action No.
	)	86-142 JRR
JOHN C. ELLINGSWORTH,	)	
ET AL.,	)	
	)	
Respondents.	)	

George L. Reynolds, petitioner, ***pro se.***

Loren C. Meyers, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, attorney for respondents.

MAGISTRATE'S REPORT AND RECOMMENDATION

Dated: July 25, 1986

Wilmington, Delaware

/s/ N. Richard Powers
POWERS, U. S. MAGISTRATE

The petitioner in this habeas corpus action, George Lee Reynolds, challenges his state court convictions of murder in the first degree, robbery in the first degree, and conspiracy in the second degree. All three claims raised in the petition relate to the prosecutor's opening remarks to the jury in which he extensively referred to two written confessions made to the police by Reynolds. After the commencement of the trial, an evidentiary hearing was conducted on the defense's motion to suppress the confessions. At the conclusion of the evidentiary

hearing and before a ruling by the trial judge, the prosecutor announced he would not introduce the statements into evidence. Although the reasons articulated by the prosecutor were somewhat vague, it appears that the statements were elicited from Reynolds while he was in prison awaiting trial on other charges and was already represented by counsel on those charges. The prosecutor had concluded from speaking to Reynolds' other counsel that the police did not obtain permission from counsel before interrogating him about the instant charges so that his sixth amendment rights may have been violated by the questioning.

Petitioner's three claims are as follows: (1) misconduct by the prosecutor in referring to the confessions in his opening remarks that were never admitted into evidence; (2) abuse of discretion by the trial judge in failing to *sua sponte* instruct the jury to disregard the prosecutor's reference to the confessions; (3) ineffective assistance of counsel inasmuch as petitioner's trial attorneys failed to move for a mistrial, failed to ask the trial judge for a cautionary instruction to the jury, and failed to raise the issue on direct appeal.

The trial took place in June 1977. Following the conviction, there were protracted post-trial proceedings on matters not related to the issues raised here. Ultimately an appeal was taken and petitioner's conviction was affirmed. Reynolds v. State, 424 A.2d 6 (Del. 1980). In 1982, petitioner filed a motion for post-conviction relief which for the first time challenged the prosecutor's reference to the confessions in his opening statement. After two evidentiary hearings the motion was denied by Judge Taylor without reaching the merits because of petitioner's

counsel's tactical decision not to object at trial. The decision was affirmed by the Delaware Supreme Court. Reynolds v. State, No. 370, 1983 (Del. Jan. 16, 1985). Petitioner then reapplied for post-conviction relief, charging ineffective assistance of counsel and abuse of discretion by the trial judge. The second motion was denied as repetitive under Superior Court Criminal Procedure Rule 35(a). Reynolds lodged an appeal of the latter decision with the Delaware Supreme Court, but voluntarily dismissed the appeal in favor of seeking habeas corpus relief in this Court.

In Wainwright v. Sykes, 433 U.S. 72 (1977), the Supreme Court held that federal habeas corpus review to consider the merits of an alleged *Miranda* violation is unavailable if the defendant failed to abide by the state court's procedural rules for objecting to the introduction of the tainted confession unless there is a showing of both cause and prejudice. In Engle v. Isaac, 456 U.S. 107 (1982), the Court held that a defendant's failure to abide by a state procedural rule for objecting to an unconstitutional jury instruction will bar habeas corpus relief unless there is a showing of cause and prejudice. The essence of petitioner's first two claims is that the prosecutor's improper references to the confessions denied him a fair trial. However I conclude that petitioner has failed to show "cause" for his failure to timely seek a mistrial because of the prosecutor's alleged misconduct, failure to timely request that the trial judge give a cautionary instruction to the jury to disregard the prosecutor's opening remarks, and failure to raise the issue on direct appeal. Consequently this Court is barred from considering the merits of the first two claims in the petition.

The state courts engaged in a *Wainwright v. Sykes*-type analysis and concluded that petitioner had not shown justifiable cause for the failure to object in a timely manner. That conclusion is not binding on this Court, but the subsidiary or historical factual findings supporting the conclusion are binding on this Court if they have fair support in the record, Wainwright v. Witt, 469 U.S. ___, 105 S.Ct. 844 (1985); Maggio v. Fulford, 462 U.S. 111 (1983); Sumner v. Mata, 449 U.S. 539 (1981).

Judge Taylor found, based on the testimony of the two defense attorneys, that the failure of counsel to move for a mistrial, to request a cautionary instruction or to raise the issue on direct appeal was a strategic choice. This factual finding has fair support in the record. Although neither attorney could specifically recall his thought process when questioned five years after the event, both indicated they probably did not move for a mistrial because the prosecutor's case, absent the confession, was not a strong one. At that point they were optimistic for an aquittal [sic], and they did not want to give the prosecutor a second opportunity to put his case together and possibly even find a ground for getting the confessions into evidence. As for the failure to request a cautionary instruction from the trial judge, both attorneys testified that since the jury had heard more than a week's worth of testimony since the prosecutor's opening statement, the effect of the remarks had been ameliorated and they did not want to remind the jury just before their deliberations of the promised confessions. With respect to the failure to assert the prosecutor's remarks on direct appeal, the attorney responsible for the appeal gave two reasons. First, having decided as a matter of strategy to

keep silent on the matter at the trial, counsel could not very well raise it on appeal. Second, there were several good grounds for appeal and counsel did not want to dilute the effectiveness of those grounds by raising a weak ground. Although petitioner contends that his attorney's failure to raise the issue at trial or on direct appeal was either inadvertence or lack of knowledge of the applicable law, Judge Taylor concluded otherwise and his finding that a strategic choice was made by counsel is binding on this Court. Since the failure to raise the issue at trial or on direct appeal was the product of a deliberate choice, there has been no justifiable cause shown. Reed v. Ross, 468 U.S. 1, 13-14 (1984). Thus consideration of the merits of these claims is barred by *Sykes* and *Isaac*.

I conclude that it is appropriate to decide the merits of petitioner's ineffective assistance of counsel claim. Although petitioner has never explicitly claimed in state court that his attorneys were ineffective, he did claim that the failure of his attorneys to raise the impropriety of the prosecutor's opening statement at trial or at the appeal stage was either inadvertence or lack of knowledge of the applicable law. This is tantamount to a claim of ineffective assistance of counsel and petitioner thus afforded the state courts a fair opportunity to address the issue. Moreover ineffective assistance of counsel claims are normally pursued in state court in collateral proceedings so that there has been no procedural default in the failure to raise the issue on direct appeal that would bar consideration on the merits. However, after considering the merits of the claim, I conclude that the claim is without merit because the performance of counsel was within the wide range of professionally competent counsel. Strickland v.

Washington, 466 U.S. 668, 690 (1984). The reasons for counsel's failure to raise the prosecutor's remarks at trial and on direct appeal have already been addressed. Since the factual findings of the state court that these were strategic decisions have fair support in the record, they are binding on this Court.

In Strickland v. Washington, *supra*, 466 U.S. at 690-91, the Supreme Court noted that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. In this case, defense counsel provided the reasoning for their decisions not to challenge the prosecutor's remarks either during trial or on direct appeal. While another attorney might have chosen a different strategy during trial, the option chosen by the particular counsel representing petitioner was plausible considering the circumstances. As for the issues to be raised on direct appeal, I agree with counsel that, having chosen as a matter of strategy not to seek relief from the trial court because of the prosecutor's remarks, he could not very well raise that issue on appeal. Also, having concluded that the prosecutor's improper remarks were one of his weaker issues for appeal, defense counsel was not constitutionally required to raise it anyway before the Delaware Supreme Court. Jones v. Barnes, 463 U.S. 745, 751 (1983).[1] Consequently

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[1] The Delaware Supreme Court's decision on the direct appeal indicates that that issues that were raised by defense counsel were troubling to it, although the bottom line conclusion was that no reversible error occurred. Reynolds v. State, 424 A.2d 6 [(Del. 1980).]

petitioner has not established that his defense counsel was ineffective at trial or on appeal.

Since this Court will not reach the merits of petitioner's claims that he was denied a fair trial, and since his claim of ineffective assistance of counsel is found here to lack merit, I recommend that the writ be denied and the petition dismissed.

IN THE SUPREME COURT
OF THE STATE OF DELAWARE

GEORGE LEE REYNOLDS, Defendant Below, Appellant,	)	
v.	)	No. 204, 1979
STATE OF DELAWARE, Plaintiff Below, Appellee.	)	

Submitted: October 14, 1980
Decided: December 5, 1980

Before HERRMANN, Chief Justice, and QUILLEN and HORSEY, Justices.

Upon appeal from Superior Court. Affirmed.

Karl Haller (argued), Assistant Public Defender, Georgetown, for defendant-appellant.

Merritt Burke, III (argued), Deputy Attorney General, Georgetown, for plaintiff-appellee.

PER CURIAM:

The defendant, George Lee Reynolds, was convicted of murder in the first degree, robbery in the first degree and conspiracy in the second degree. He appeals from the judgment below and from the failure of the Superior Court to grant a new trial on newly discovered evidence. Four matters are raised.

First, the defendant argues that it was error for the Trial Judge to permit a police detective to give an opinion of the significance of the defendant's change in

demeanor, so-called "body language", as part of the detective's testimony concerning the interrogation of the defendant on February 13, 1976. The foundation for any such expert opinion indeed appears extremely thin. But the opinion added little, if anything, to the detective's factual recitation. Moreover, since the detective also noted that the defendant in the same conversation thereafter said he knew who committed the murder, the detective's opinion that the defendant "had some intimate knowledge of the incident" amounted to little more than surplusage. If the opinion evidence was admitted in error, it was clearly harmless. Superior Court Criminal Rule 52(a).

Second, the defendant argues that it was error to exclude the tape recording of a truth serum interview with the defendant. The interview had taken place pursuant to a written pretrial stipulation that included an agreement "[t]hat the results of the sodium penathal [sic] test . . . shall be admissible" at trial.* The defendant, through the administering doctor, offered the results, which were favorable to him, particularly as to his exculpatory denial of his presence at the scene on the date of the crime. The defendant argues that the tape was admissible on the basis of the stipulation and independently admissible under our statute, 11 *Del.C.* § 3507, which provides for the use of a voluntary out-of-court prior statement as affirmative evidence regardless of whether the statement of the declarant is consistent with his in-court testimony.

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*Sodium amytal was actually used.

We agree with the Superior Court that the above quoted language of the stipulation as to "results" did not include a tape recording of the entire interview and related procedure. Rather, it seems clear that some confirmation or negation of defendant's version of the facts was contemplated. The doctor testified in support of the defendant.

The argued statutory basis for admission is somewhat confusing to deal with in the context of this appeal. Procedurally, insofar as the immediate trial record at the point of the ruling discloses, the statutory basis was not even mentioned until after the ruling on the tape and then counsel's comments were expressly not offered "in the way of further argument." No ruling followed the mention of the statute. Initially the tape had been offered "for the plain pleasure of the jury". Thus, the record indicates that the Trial Judge never expressly ruled on the statutory basis and perhaps he was never asked for a ruling on that narrow point. Substantively, it should be noted that the evidence showed that truth serum produces "a partially sedated state" where "the conscious mind loses the power to monitor, to censor, what is being said." Thus, it is doubtful that a statement made while under the influence of the drug can qualify as a "voluntary out-of-court prior statement" as required by the statute and as " the product of a rational intellect and a free will' " as the statute has been construed. *State v. Rooks*, Del.Supr., 401 A.2d 943, 948-49 (1979). It should also be noted that the defendant was given the additional advantage of testimony of the doctor's impression that the defendant was telling the truth. Under the circumstances, there is no reversible error as a result of a failure to admit

the tape. See *Eaton v. State*, Del.Supr., 394 A.2d 217, 218-20 (1978).

The final two matters relate to the motion for new trial on the ground of newly discovered evidence. The chief investigating officer at the time of the investigation, who has since retired from the State Police, was instrumental in instituting a posttrial review of the case by the Superior Court and his affidavit formed the basis of the motion for new trial.

The third alleged error was the Trial Court's refusal to qualify the chief investigating officer as a fingerprint expert for the defense during the hearing on the motion for a new trial. It appeared that the officer at one time had taken a multiday course in fingerprint lifting techniques and their classification but, except for this case and frequent lifting, he had never worked with fingerprints or classified them. The cross-examination of the investigating officer with regard to classification of fingerprints demonstrated scant knowledge at best. The ruling denying his expert status was not an abuse of discretion. *Peters v. Gelb*, Del.Supr., 314 A.2d 901, 903 (1973). Moreover, the Trial Judge made it clear that he rejected factually the suggestion that the fingerprint in question was that of the Puerto Rican suggested. There was no error.

Finally, the defendant urges that the Trial Judge abused his discretion in denying his motion for a new trial which was based on newly discovered evidence. While the appearance of the chief investigating officer as a posttrial witness for the defense naturally gives one

pause, it is the substance of the newly discovered evidence which must be the focus of the inquiry.

As we understand the evidence, a palm print proved of no identification value, two experts testified that the controversial fingerprint was of no identification value, evidence as to the Puerto Rican's association at or near the scene of the crime was far less positive than suggested by the motion, and some evidence relating to the Puerto Rican and certain minibike tire tracks was in the police record all along and available to the defense at the time of trial. On this record, the denial of the motion for a new trial was not an abuse of discretion. See *State v. Lynch,* Del.Ct. O & T, 128 A. 565 (1925).

The judgment of the Superior Court at trial and the denial of the posttrial motion for a new trial are affirmed.

IN THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE,	)	Criminal Action Numbers
	)	76-04-0026; 0027; 0027A
v.	)	
	)	
GEORGE LEE	)	
REYNOLDS,	)	

Submitted: August 31, 1983
Decided: December 9, 1983

Gary A. Myers, Esquire, for the State of Delaware

Robert C. Wolhar, Jr., Esquire, of Wolhar and Moore, for the defendant

ORDER

On Motion Of Defendant For Post-Conviction Relief – Denied

This 9th day of December, 1983.

1. Defendant was convicted of murder in the first degree, robbery in the first degree, and conspiracy in the second degree on June 15, 1977. After sentencing, defendant appealed the convictions to the State Supreme Court. During the pendency of that appeal defendant filed a motion for new trial on the ground of newly discovered evidence and the matter was remanded to this Court for proceedings involving the motion for new trial. After a hearing, this Court denied defendant's motion for a new trial. The Supreme Court affirmed the convictions on December 5, 1980. *Reynolds v. State*, Del. Supr., 424 A.2d 6 (1980). This motion for post-conviction relief was

filed June 29, 1982.[1] Hearings have been held and briefs have been submitted.

2. The issue in this motion is whether the reference by the Deputy Attorney General in his opening statement to a confession[2] by defendant followed by the failure of the Deputy Attorney General to put the confession in evidence during the trial warrants post-conviction relief where the defendant's attorney did not seek a mistrial during the course of the trial. At the outset it is noted that the issue raised herein is subject to a "contemporaneous objection" rule. Cf. *Conyers v. State*, Del. Supr., 422 A.2d 345 (1980); *State v. Herhal*, Del. Super., 307 A.2d 553 (1973). In this case defendant and his attorneys did not object to the Deputy Attorney General's reference to the confession either when it was stated or at any time prior to this motion, five years after his conviction. The parties agree that where no "contemporaneous objection" is made the holding of the Delaware Supreme Court in *Conyers v. State*, supra, requires that the test established by the United States Supreme Court for determining when federal habeas corpus review must be applied when considering a Rule 35 motion. Under that test, which is commonly known as a "cause and prejudice" test, collateral review is unavailable where there has been

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[1] Subsequent to the filing of this motion, defendant has filed a motion for a new trial based upon the decision of this Court in *State v. Young*, Del. Super., Cr.A. No. 77-09-0001-0004, O'Hara, J. (Oct. 4, 1982). That motion has been assigned to Judge O'Hara for decision and is not being considered in this Order.

[2] It is not contended that at the time the Deputy Attorney General referred to the confession he did not intend to introduce the confession in evidence.

no contemporaneous objection unless the defendant in the criminal proceeding demonstrates (1) "cause" why he should be relieved of the waiver which flows from the failure to make timely objection, and (2) prejudice to him resulting from the challenged matter. Cf. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). In the more recent case of *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) the Supreme Court reaffirmed its adherence to the cause and prejudice test, but inserted the restrictive adjective "actual" as a qualification of the prejudice factor. *Engle* held that futility of presenting an objection "cannot alone constitute cause for a failure to object at trial." *Engle* also observed:

> Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to
>
> [456 US 134]
>
> omit respondents' due process argument while pursuing other avenues of defense. We have long recognized however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default. (Footnotes omitted).

In *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), decided on the same day as *Engle v.*

Isaac, supra, the Supreme Court commented on the prejudice aspect of the "cause and prejudice" test, stating that "the degree of prejudice resulting from [the error relied on must] be evaluated in the total context of the events at trial." Further, *Frady* stated that the defendant's burden is to prove that the error relied on "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."

3. In applying the "cause and actual prejudice" test, the first consideration is whether the facts and circumstances show that there was cause for the failure of the defense to have raised objection by way of a motion for mistrial at the time the Deputy Attorney General announced (outside of the presence of the jury) that he would not seek to introduce defendant's confession which he had referred to in his opening statement. Defendant was represented by two attorneys experienced in the trial of criminal cases. Joseph Hurley, Esquire, defendant's lead counsel, had served as Deputy Attorney General for a number of years and had successfully prosecuted many serious cases. After leaving the Attorney General's office he had represented defendants in various cases involving serious charges, including two murder cases. In this instance he was retained by the Public Defender to represent this defendant. Karl Haller, Esquire, who assisted in the defense in this case had served with the Public Defender's office for approximately 7 years prior to this trial. It is clear from the testimony of the defendant's attorneys that they viewed the announcement of the Deputy Attorney General that he would not seek to introduce the confession in evidence as a substantial victory and that they desired to push

forward to conclude the trial because they then anticipated a verdict in defendant's favor. Defendant's lead trial counsel testified that he did not seek an admonition from the Court for the jury to disregard the Deputy Attorney General's prior reference to the confession because it would only focus attention on the prior references. With reference to his not seeking a mistrial, he testified that he had had no recollection of his mental processes. However, he testified, based upon his experience, that after two or three days of trial a jury forgets what was said in an opening statement. Moreover, he testified that he may not have moved for a mistrial at that stage in the trial because he did not want to give the prosecutor the opportunity to strengthen his presentation at a new trial. Defendant's other attorney, who had not taken a primary role in the trial, testified that he would have opposed making a motion for mistrial because he would not have wanted to give the prosecution another chance to strengthen its case and that he believed that the prosecutor decided not to seek introduction of the confession because some of the statements in the confession refuted other evidence in the prosecutor's case. He further testified that in formulating the issues for the appeal he researched the subject of the prosecutor's reference to the confession and the subsequent failure to introduce the confession, as a possible ground for appeal and concluded that it did not have merit, and also he felt that raising that subject on appeal would detract from the more meritorious arguments which were the thrust of the appeal. Defendant contends that the reason for the failure of his attorneys to raise the issue at trial or at the appeal stage was either inadvertence or lack of knowledge of the

applicable law. I do not find that those contentions have been proved by this record.

4. Considering the experience and competence of defendant's attorneys and the quality of the defense made in this case, I find that the situation here falls squarely within the language of *Engle* that "[c]ounsel might have overlooked or chosen to admit [sic] respondents' due process argument while pursuing other avenues of defense". Under the reasoning of *Engle* the situation existing here does not constitute cause justifying relief from the failure to make timely objection.

5. Since the Court has found that defendant has not met the "cause" prong of the "cause and prejudice" test, it is not necessary for the Court to discuss the "prejudice" prong, namely, whether the comments of the prosecutor "worked to [the defendant's] actual and substantial disadvantage infecting the entire trial with error of constitutional dimensions". This would call for an evaluation of the evidence presented at trial. It has been noted earlier in this Order that defendant has filed a motion for new trial based upon the decision of this Court in *State v. Young*, supra, which has been assigned to Judge O'Hara for appropriate action. Any consideration of the evidence in this case must include a consideration of the matters raised in that motion. In view of this, the Court will not comment further on the evidence in this case.

Based on the foregoing,

IT IS ORDERED that the motion of defendant for post-conviction relief based upon the reference by the

Deputy Attorney General in his opening statement to a confession by defendant is denied.

CLARENCE W. TAYLOR
J.

IN THE SUPREME COURT OF THE
STATE OF DELAWARE

GEORGE LEE REYNOLDS, Defendant Below, Appellant,	)	
v.	)	No. 370, 1983
STATE OF DELAWARE, Plaintiff Below. Appellee.	)	

Submitted: September 20, 1984
Decided: January 16, 1985

Before HERRMANN, Chief Justice, McNEILLY and HORSEY, Justices.

ORDER

This 16th day of January, 1985,

Upon consideration of the briefs submitted by the parties and their contentions at oral argument, it appears to the Court that:

(1) On June 15, 1977, defendant was convicted of Murder in the First Degree, Robbery in the First Degree, and Conspiracy in the Second Degree. This Court

affirmed defendant's convictions on December 5, 1980. *Reynolds v. State*, Del. Supr., 424 A.2d 6 (1980).

(2) On June 29, 1982, defendant filed a motion for post-conviction relief pursuant to Superior Court Rule 35(a). The Superior Court denied the motion on December 9, 1983. The defendant appeals that denial to this Court.

(3) The issue which this Court confronts is whether the reference by the Deputy Attorney General in his opening statement to a confession by defendant followed by the failure of the Deputy Attorney General to put the confession into evidence during the trial warrants post-conviction relief where the defendant's attorney did not seek a mistrial during the course of the trial, and did not raise the issue on direct appeal.

(4) In *Conyers v. State*, Del. Supr., 422 A.2d 345 (1980), this Court held that where the defendant failed to make an objection at trial he must when seeking post-conviction relief show cause for relief from his failure to make a proper objection in the Trial Court and actual prejudice resulting from the alleged constitutional violation. The cause prong of the *Conyers* test precludes collateral review of claims which reasonably competent counsel intentionally chose not to press, in accordance with procedural rules, as part of a tactical strategy. *See Reed v. Ross*, 104 S.Ct. 2901, 2909 (1984).

(5) The finding of the Trial Court as to whether a choice of counsel was strategic is a finding of fact that will not be disturbed upon appeal unless clearly erroneous. *See Harris v. State*, Del. Supr., 305 A.2d 318, 319 (1973), *Bowers v. State*, Del. Supr., 396 A.2d 962 (1978),

Washington v. Strickland, 5th Cir., 693 F.2d 1243, 1256 (1982). Here, the Trial Court found that such a strategic choice was made and therefore, no cause existed for defendant's failure to make a proper objection. Upon a review of the record, we cannot say that the Trial Court's finding is clearly erroneous.

(6) Defendant urges this Court to modify its holding in *Conyers* by considering the cause requirement met if there would otherwise be a miscarriage of justice. Upon the facts of this case, we refuse to so modify our prior holding.

(7) The record contains sufficient evidence to support the Trial Judge's findings of fact contained in his letter opinion of December 9, 1983. To the extent the appeal presents issues of law, the same are clearly controlled by settled Delaware law.

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court be and it hereby is

AFFIRMED.

BY THE COURT:

/s/ John J. McNeilly
Justice

SUPERIOR COURT
OF THE
STATE OF DELAWARE

ROBERT C. O'HARA
JUDGE

COURT HOUSE
WILMINGTON, DE
19801-3353

March 12, 1986

Gary A. Myers, Esq.
Deputy Attorney General
Department of Justice
P.O. Box 508
Georgetown, DE 19947

Mr. George L. Reynolds
Sussex Correctional Institution
R. D. 1, Box 500
Georgetown, DE 19947

Gentlemen:

RE: STATE v. GEORGE L. REYNOLDS
IS76-04-0026, 0027 – Motion per Rule 35(a)

This letter is intended as the Court's disposition of the defendant's pro se motion filed August 14, 1985. It should be noted initially that the Court has had the opportunity to consider the entire trial transcript, in connection with an earlier defendant motion for new trial decided adverse to defendant on January 29, 1986, the decision of Judge Taylor on December 9, 1983 denying defendant's previous motion under Rule 35(a) and the affirmation of that ruling by the Supreme Court under date of January 16, 1985, together with the contentions made by defendant in the current motion before the

Court, the State's response thereto by letter dated February 17, 1986, and the defendant's letter response dated February 20, 1986.

The Court is persuaded that the arguments presented by the State, in its letter of February 17, 1986, and the authorities relied [upon] therein, effectively support a denial of defendant's current motion. The Court is persuaded, for example, that the principles articulated in *Sanders v. United States*, 373 U.S. 1 (1963) are applicable and that the Court "need not entertain a second or successive motion for similar relief on behalf of the same applicant" except in extraordinary situations set forth in that decision.

Although the defendant is herein raising the issue of inadequacy of counsel, and error on the part of the Court, under constitutional labels for the first time, the record reflects, that the same issues were presented and determined by the Court in the motion decided by Judge Taylor and affirmed by the Supreme Court.

Stated briefly, the contentions of the defendant are grounded on the fact that the prosecutor at trial referred to the defendant's "confession" in his opening statement but subsequently abandoned efforts to present this "confession" as evidence at the trial, it being defendant's contention that his counsel should have moved for a mistrial because of the potential prejudice involved and/or that the Court should have taken such action on its own. However, the record reflects that these contentions were examined in full by Judge Taylor, after an evidentiary hearing, and that he was satisfied, from a legal standpoint, and was affirmed by the Supreme Court, that the

defendant's experienced trial counsel had, in fact, made a strategic and tactical decision not to raise the mistrial issue believing that the defendant's position was at that point in time better before that jury than it could possibly be at some subsequent trial if a mistrial had been granted.

The defendant in his current motion raises nothing new which, by any stretch of the imagination, would suggest that these earlier decisions by Judge Taylor and the Supreme Court were in error, or that a reexamination of the factual setting would in any way enhance the defendant's position under constitutional labels newly asserted.

It is the Court's conclusion that defendant's contentions have been fully and adequately presented and heard, and appropriate decisions reached thereon by Judge Taylor and the Supreme Court, leaving this Court no alternative but to summarily deny defendant's current motion for post-conviction relief pursuant to Rule 35(a).

IT IS SO ORDERED.

Respectfully,

/s/ Robert C. O'Hara

RCOH:dm
xc: Prothonotary – Sussex County

IN THE SUPREME COURT OF
THE STATE OF DELAWARE

GEORGE L. REYNOLDS	)	No. 73, 1986
	)	Cr.A. Nos.
vs	)	IS76-04-0026,-0027
STATE OF DELAWARE	)	Superior Court
	)	Sussex County

The following docket entry has been made in the above cause.

5. March 26. Notice of voluntary dismissal by appellant.

6. March 26. Certified copy of dismissal to clerk of court below. Case closed.

cc: The Honorable Robert C. O'Hara
George L. Reynolds
Gary A. Myers, Esq.
Date: 3/26/86

/s/ LAC
Clerk